

Family Harmony: An All Too Frequent Causality of the Estate Planning Process

Timothy P. O'Sullivan

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FAMILY HARMONY: AN ALL TOO FREQUENT CASUALTY OF THE ESTATE PLANNING PROCESS

Timothy P. O'Sullivan*

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INTRODUCTION

Estate planning in its broader context extends beyond the traditional confines of providing for the investment, management, and disposition of assets in the event of the owner's disability or death. Estate planning includes preservation of family values and traditions, not the least of which is family harmony.

Family relationships that are particularly vulnerable in the estate planning process are those between a parent and adult children, a step-parent and adult step-children, adult children and adult step-children, and among adult children. Such relationships are at risk not only in the implementation phase of the estate plan following a parent's or step-parent's disability or death, but also if a parent chooses to seek their input in the development of the estate plan or inform them of plan aspects following its completion. Spousal disharmony is an infrequent casualty of the estate planning process.¹ Although married persons typically come from different perspectives, they nonetheless are inclined to discuss and ultimately agree on the appropriate estate plan.² Due to the higher age of their client base, elder law attorneys confront vulnerable family situations involving clients with adult children and/or step-children on a more frequent basis than estate planning attorneys in general.

When asked, most estate planning clients are quick to confirm that they place a higher value on the preservation of family harmony than on the amount of worldly possessions they pass on to family members following their death. Yet, paradoxically, most estate planning attorneys historically seem to devote little more than a modicum of attention to this issue

1. See Carolyn L. Dessin, *Protecting the Older Client in Multi-Generational Representations*, 38 FAM. L.Q. 247, 267-68 (2004) (discussing how couples can be represented by the same attorney because "[i]n most situations such consent [to joint representation] is probably not required because the family is harmonious and the couple's interests are not adverse").

2. *Id.*

when counseling clients or drafting estate planning documents. Emblematic of this oversight is the paucity of estate planning seminars, textbooks, treatises, and articles that even address this issue or give it any extended discussion.³ The limited discussion found in legal periodicals that even touches upon family harmony is mostly directed at the much narrower issue of avoiding challenges to the testamentary instrument where there is at least one disfavored adult child. For example, when all children are either not receiving an equal share of their parent's estate or trust or at least one child's care is being held in a long-term restrictive "spendthrift trust" with a third party trustee.⁴

It is as if the family harmony aspect of estate planning is of little importance to clients, not technical enough to be worthy of discussion in erudite estate planning publications and seminar presentations, or strictly an internecine family issue more properly suited to family counselors than estate planning attorneys. The failure of estate planning attorneys to focus on family harmony issues undoubtedly has been a major factor in the prevalence of disharmonious situations occurring among the family members of their clients in the planning, family discussion, and implementation phases of the estate planning process.

The purpose of this article is not to cast any "broad brush" aspersion on estate planning attorneys as a class for not adequately addressing this issue. The author was comfortable far too long in a glass-laden estate planning edifice for that even to be an option. It was only after more than a decade of practice concentrated in estate planning that the author began to recognize and appreciate both the magnitude of this issue and

3. See, e.g., GEN. PRACTICE SESSION, AM. BAR ASS'N, WILLS AND ESTATE PLANNING GUIDE: A STATE AND TERRITORIAL SUMMARY OF WILL AND INTESTACY STATUTES (1995) (discussing distribution to descendants, will execution, estate planning, and gifts without mention of family harmony considerations) (hereinafter WILLS AND ESTATE PLANNING GUIDE).

4. See, e.g., Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation with Pre-Death Procedures?* 2 NAT'L ACAD. OF ELDER L. ATT'YS J. 349 (2006).

that many generally accepted estate planning strategies and the conventional wisdom undergirding them are inapposite to the maintenance of family harmony.

Nor would any such opprobrium be appropriate. Focusing on family harmony simply is not intuitive to estate planning attorneys. The proper recognition of this problem area also has been hindered by a long-standing professional emphasis on technical estate planning issues which has held sway against the assimilation of suitable family harmony strategies in the planning and implementation phases of the estate planning process.

Rather, this article is intended to be a clarion call for estate planning attorneys to commence placing a much greater emphasis on this issue. To that end, discussed herein are estate planning factors and generally accepted techniques which tend to negatively impact upon family harmony and proactive alternative strategies which can serve to further its preservation. Interestingly enough, absent such emphasis, there can be no reasonable certainty that the traditional estate planning goals of maximizing the amount of assets passing to family members by minimizing taxes and administrative costs, and ensuring assets devolve to family members in the desired manner following death, will be satisfactorily realized. Family discord can significantly increase the legal fees and other costs of administering a trust or estate, thereby commensurately reducing the amount of assets passing to family members following a parent's death. It can also severely damage the integrity of the estate plan by skewing the intended disposition of estate or trust assets among family members.

SELECTION OF FINANCIAL FIDUCIARY

The estate planning decision that probably has the most frequent and dramatic impact on family harmony is the selection of the financial fiduciary to administer assets following the owner's disability or death, be it an executor or personal representative under a will, a trustee of a revocable trust, or an attorney-in-fact

serving under a financial power of attorney.⁵

Absent concerns regarding a spouse's financial expertise or other factors that may negatively affect a spouse's proper management of assets, married clients normally choose their spouse as sole initial financial fiduciary.⁶ This is a natural choice in which the desires of a married couple understandably should predominate, and significant family harmony considerations usually are not present.⁷

However, regarding the selection of a financial fiduciary to succeed a spouse, or an initial financial fiduciary for a widow, widower, or other unmarried parent, in the absence of adequate counseling a parent is unlikely to give more than a passing consideration to naming a non-family member over a mature and responsible adult child. This proclivity is attributable to two principal factors. First, the natural tendency of a parent is to fail to consider -or grossly underestimate- the family harmony risk in naming a child or children as financial fiduciary. Secondly, there is an equal parental inclination to grossly overestimate whatever benefits are achievable by having a family member serve in such capacity.⁸

Parents tend to view the administration of their estate or trust as an uncomplicated low risk "family matter" best handled by family members with whom they have a close relationship

5. See generally WILLS AND ESTATE PLANNING GUIDE, *supra* note 3, at 1-5 (discussing fiduciary forms and responsibilities).

6. See L. RUSH HUNT & LARA RAE HUNT, A LAWYER'S GUIDE TO ESTATE PLANNING: FUNDAMENTALS FOR THE LEGAL PRACTITIONER 125 (3d ed. 2004) (discussing how spouses often name each other as executors).

7. See *id.* A notable exception is an estate plan calling for the disposition of the predeceased spouse's estate to the children of the predeceased spouse who are step-children of the surviving spouse, either at the death of the predeceased spouse or upon the death of the surviving spouse. For plan integrity and family harmony reasons, clients should consider naming an independent financial fiduciary to serve either alone or as a co-fiduciary with the surviving spouse. Estate planning attorneys are acquainted with the challenges to plan integrity that this situation poses, and they typically find clients receptive to contemplating the selection of a third-party fiduciary.

8. See *id.* at 128 (discussing complexities of trustee's duties in handling trust assets for the benefit of another and that trustees should have investment capabilities).

and thus who they instinctively assume to be the best candidates to carry out their intent in the management of their assets and their ultimate disposition to family members. In point of fact, the administration of an estate or trust is typically a complex financial fiduciary matter that only coincidentally involves family assets and with respect to which the infusion of family dynamics can not only be highly divisive but hindering of both proper asset administration and the intended parental distribution of the estate or trust.⁹

Unfortunately, it appears that the same propensity is held by a high percentage of estate planning practitioners, if not actively, at least tacitly through their unquestioning acquiescence in the fiduciary preference of their clients. Far too often, the discussion between clients and estate planning counsel regarding the selection of a financial fiduciary is confined to a simple inquiry by counsel regarding whom the client prefers to serve in such capacity. If the client indicates a preference for a child or children, counsel may seek confirmation that the appointed person(s) is mature, financially responsible, and "get along" with the other children who are not being named as financial fiduciary. However, it appears that in the vast majority of circumstances, there is no comprehensive discussion of the benefits, risks, costs, and burdens associated with appointing a family member as financial fiduciary in contrast with naming a financially astute third party.¹⁰ Without this discussion, a client simply cannot make an informed decision on this issue.¹¹

Adherence to this convention by estate planning practitioners and their clients has been one of the most enduring and pervasive causes of disharmonious family situations

9. *Id.* at 125 (noting that "[o]ften the handling of the distribution . . . by a brother or sister who serves as executor can cause hurt feelings and hostile reactions, the wounds from which may never heal.").

10. *Id.* at 125 (encouraging practitioners to ask clients to consider the nature of their estate and what will be required to properly settle the estate carefully). "[The] activities involved in estate settlement require a more thorough discussion of this important function [of estate asset management] with the client than simply asking whom they would like to name as executor." *Id.*

11. *See id.*

following a parent's disability or death. The author is unaware of any empirical studies on this issue. However, based upon thirty years of estate planning experience and numerous peer inquiries, it would appear reasonable to estimate that there is a one-third risk of significant family discord in the post-death administration of an estate or trust in the circumstance where there is more than one then-living adult child and a child or children serves as financial fiduciary.¹² This risk becomes significantly greater if an adult child is receiving a lesser or more restricted interest than another child or children under the estate plan or at least one step-sibling of the financial fiduciary is a beneficiary of the estate or trust. Irrespective of the quantifiable nature of the risk, it is beyond reasonable debate that substantial family disharmony in this circumstance is far from an isolated occurrence.

Compounding the harmful effect of family disharmony resulting from the appointment of a child as financial fiduciary is its likely extended duration. Many family jealousies, disagreements, and outright disputes involving a parent's selection of the family fiduciary or such fiduciary's administration of a parent's estate or trust result in life-long family schisms. Much of this long-term consequence results from the fact that contacts between adult children, who increasingly tend in modern society to be geographically dispersed, can be of an infrequent or non-continuing nature. Disputes among family members who frequently interact with each other, such as husbands and wives, adolescent and young adult children, and mature adult children involved in a family business, are much more likely to reach at least an acceptable accommodation, if not an early amicable resolution.

There is a direct correlation between the number of children and in-laws of a parent and the attendant risk to family

12. Although there was an unexpectedly wide range (between ten and ninety percent) in the estimated degree of this risk opined by estate planning attorneys and other professionals surveyed by the author, the vast majority of such opinions fell in the twenty-to-forty-percent range.

harmony when a child or children serve as financial fiduciaries. It comes as a surprise to most clients and many estate planning attorneys lacking in experience that the size of the estate is not a consistent factor in assessing the degree of this risk.

ROLE OF FAMILY DYNAMICS

The reasons why family disharmony frequently results when a child serves as a financial fiduciary are legion. Perhaps first and foremost is the effect of the parental bond. Parents are the emotional "glue" that melds the family unit. Stripped of this cohesion by the death or disability of a surviving parent, grief, "orphan syndrome," and even anger¹³ often combine to create a highly-charged emotional cauldron among the surviving children and their spouses that negatively impacts the harmonious management of a parent's estate or trust. The feelings of family members at this time are usually at their most sensitive and thus are easily injured. The mindset of adult children in such an environment often will revert to a level that is virtually indistinguishable from adolescent sibling rivalry. Children may be indignant and feel their parents, who named a sibling as financial fiduciary with the associated economic power and authority over family assets, have unfairly diminished their worth as a child.

In short, the dynamics of a child's past relationships with siblings, particularly in his or her formative years, as well as the child's relationship with his or her parents, tends to so impact a child's judgment that the child frequently is incapable of either accepting the propriety of the appointment or objectively evaluating the proper discharge of a sibling's fiduciary duties. This very unstable family harmony environment often is

13. Anger is frequently associated with grief. Anger resulting from the loss of a family member may also be redirected against other family members regarding elements of the estate or trust administration process deemed to be improper or inequitable. See Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 422 (1997).

fomented by unwelcome in-law participation.

The appointment of only one child or fewer than all of the children to serve as financial fiduciary or co-fiduciaries frequently causes jealousy and resentment among other children. It also heightens emotional sensitivities among children who are excluded from the decision-making process. To avoid these consequences, parents often name more than one child as financial fiduciary, and if they do not have an unwieldy number of children to consider for trust or estate administration purposes, may conclude that overall family harmony would be best enhanced by appointing all children as co-fiduciaries. Although this solution may avoid the resentment and jealousy which would otherwise have been incurred by children not being appointed as financial fiduciary, such appointment will not avoid disagreements over fiduciary decisions. It also may create additional friction points, not the least of which is placing more than one child in the position of active involvement in every fiduciary decision.

The greater the number of family members named to serve as co-fiduciaries, the greater will be the risk of family discord. In such a volatile emotional environment, a much greater number of administrative issues are likely to be considered material by the co-fiduciaries. A family member serving as a co-fiduciary who is called upon to perform a disproportionate amount of the estate or trust management duties may come to resent a lack of participation or effort by other co-fiduciaries. When more than two children are appointed as co-fiduciaries, the children holding a minority position in management decisions can become embittered and conclude that their viewpoint is not given proper consideration. If there is an even number of children named as co-fiduciaries, an administrative deadlock may occur, and resolution may require an adversarial judicial proceeding.

Problems of family dynamics extend beyond the resentment of children not named as financial fiduciaries, a child's lack of objectivity in judging a sibling's discharge of

financial fiduciary responsibilities, and disagreements between or among children serving as co-fiduciaries. A Child serving as financial fiduciary can assume an arrogant, and in many cases even an imperious, attitude towards other family members who are beneficiaries of the estate or trust. Occasionally, a child serving as financial fiduciary also will improperly use their authority as a means to be vindictive towards their siblings as recompense for real or perceived past transgressions.

ISSUES INVOLVING THE ADMINISTRATION OF AN ESTATE OR TRUST

Administering an estate or trust typically proves to be far from a simple task. Family fiduciaries generally are much less informed and less diligent than experienced, competent third parties in their compliance with the provisions of the instrument as well as common law and statutory requirements governing the management of an estate or trust.¹⁴ These requirements, which have become increasingly complex over the years, can include prudent investment requirements,¹⁵ as well as requirements that other family members who are estate or trust beneficiaries receive accountings and copies of testamentary instruments.¹⁶

During the administration process, it is quite difficult for family fiduciaries to remain unbiased and objective in their decision-making when it is adverse to their own economic

14. See generally HUNT & HUNT, *supra* note 6, at 125.

15. See UNIF. PRUDENT INVESTOR ACT § 1, 7B U.L.A. 15-16 (1994). The Uniform Prudent Investor Act has been enacted in at least forty-three states and the District of Columbia, and Maryland has enacted a similar law. Nat'l Conference of Comm'rs on Unif. State Laws, States That Have Adopted the Uniform Prudent Investor Act, http://www.fpanet.org/member/govt_relation/new/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=22342 (last visited Mar. 16, 2007).

16. See UNIF. TRUST CODE § 813(c) (amended 2004), 7C U.L.A. 609-10 (2006) (providing a duty to "report" instead of "account"). Section 813(b) also requires that the trustee must notify the "qualified beneficiaries" within sixty days of the date the trustee acquires knowledge that a revocable trust has become irrevocable due to the settlor's death of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and the right to a trustee's report. *Id.* at § 813(b). Cases also outline a common law duty to account. See, e.g., *Rochell v. Oates*, 2 So. 2d 749 (Ala. 1941); *Jacob v. Davis*, 738 A.2d 904 (Md. Ct. Spec. App. 1999); *Whalen v. Whalen*, 577 N.E.2d 859 (Ill. App. Ct. 1991).

interests. Family members also can view serving as a financial fiduciary strictly as a "favor" to other family members and thus be lax in attending to their fiduciary duties. In addition, family fiduciaries frequently are under significant time constraints imposed by their business and personal activities or lacking in necessary focus such that they may fail to give proper deference to the discharge of their fiduciary responsibilities.

Consequently, unintended breaches of administrative duties and costly administrative errors by family financial fiduciaries are quite common and ordinarily not well received by other family members. Such breaches and errors obviously are more likely to occur if a family financial fiduciary is not seeking regular advice from competent legal counsel and knowledgeable investment, accounting, and tax advisors. Nevertheless, family financial fiduciaries are often blamed for these adverse consequences in circumstances where they are the direct result of the advice of legal counsel and other advisors. Even when a family financial fiduciary is making sound administrative decisions, other family members nonetheless are prone to disagree and "second guess."

There is no dearth of administrative matters handled by a family financial fiduciary that can provide a fertile ground for family disagreements. Estate or trust administration matters that can cause significant family disagreements include:

- 1) the validity of the testamentary instrument and the interpretation of its provisions, particularly the dispositive provisions, including ambiguities, language gaps, and actual and perceived drafting errors and omissions;¹⁷
- 2) the proper and appropriate distribution of tangible personal items such as jewelry, furniture, pictures, clothing, and family heirlooms among children for which there was no specific disposition in the will or revocable

17. See generally Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 ELDER'S ADVISOR 61, 67-70 (2006) (addressing how will formalities protect testator's intent and protect wills from contests brought by family members).

- trust of the decedent;¹⁸
- 3) the distribution of assets in-kind to family members in satisfaction of proportionate shares of the estate or trust (for example, disagreements as to the selection of such property and the value placed thereon, which routinely occurs with farms and closely-held business interests, as non-fiduciary family members often feel that the family fiduciary was unfairly favored);¹⁹
 - 4) the timing and timeliness in administering the estate and distributing assets to beneficiaries, as beneficiaries often exaggerate their immediate need for distributions and fail to appreciate the necessary time it takes to properly discharge administrative complexities;
 - 5) the level of fiduciary consultation, as beneficiaries tend to expect consultation with them on many substantive administrative matters even absent any legal obligation for the fiduciary to do so;
 - 6) communication with beneficiaries, as beneficiaries tend to presume the worst if there is an actual or perceived information vacuum and often complain of a lack of fiduciary communication even when the fiduciary is in compliance with all legal communication

18. See Joseph M. Scheuner & Olen M. Bailey Jr., *A Legal and Practical Guide to the Disposition of Tangible Personal Property at Death*, 20 PROB. & PROP. 66, 66-67 (2006) (discussing how tangible items of personal property "have histories, stories, mythical values, family connections, and emotional attachments" that can cause hurt feelings and sibling rivalry and how using specific and class bequests can make testamentary distribution of such items). One of the more frequent controversies is when a child claims that a parent promised or previously gave him or her an item of tangible personal property that the child expects other children to honor in the absence of any proof. In jurisdictions where such a list has legal efficacy when referenced in the testamentary instrument, the controversies surrounding distribution of tangible personal property can be lessened by a parent leaving a substantially complete list of items to be distributed to specified children by the financial fiduciary. In the absence thereof, it is helpful if the testamentary instrument provides for a time period, ninety days for example, for children to agree on such disposition and a method of disposition by the fiduciary in the absence of an agreement, including a method of bidding or random sequential selection. The testamentary instrument also should specify whether any unequal values of such disposition among children are to be equalized on the disposition of the remainder of the residuary estate or trust.

19. McMullen, *supra* note 17, at 67-70.

- requirements;
- 7) accuracy and completeness of the estate or trust inventory, as beneficiaries may believe the fiduciary is in possession of assets of the decedent not reported by the fiduciary;
 - 8) accuracy and timeliness of accountings furnished to beneficiaries;
 - 9) the persons selected by the fiduciary to serve as legal and tax counsel for the estate or trust, including the need for such counsel and fees paid;
 - 10) decisions as to the administrative disposition of estate or trust property, including whether it should be sold and at what price;
 - 11) whether the estate or trust estate was properly invested and managed during the period of administration, as beneficiaries are prone to "second guess" a family fiduciary's decision (often imposed by fiduciary responsibilities) to retain assets that depreciated during the period of administration or to sell assets that have appreciated since their disposition;
 - 12) whether the parent's outstanding bills and claims against the estate or trust were settled appropriately;
 - 13) whether claims on behalf of the decedent against others were settled appropriately;
 - 14) whether equitable distribution adjustments should be made, and in what amounts, among beneficiaries to offset the disproportionate effect on beneficiaries of either tax-saving elections made by the fiduciary during the administration of a trust or estate or the income tax basis of property distributed in satisfaction of shares of the estate or trust;
 - 15) whether loans or gifts made by the decedent to a family member were appropriately taken into account in determining that member's share of the estate or trust;
 - 16) whether a child was entitled to compensation for care of a parent in a non-fiduciary capacity during the parent's lifetime; and
 - 17) whether property passing outside the estate or trust to a child (through joint tenancy or a beneficiary designation) should be taken into account in determining the child's share of the

assets.

Fortunately, the last three matters are receptive to ameliorative provisions in testamentary instruments and are thus separately discussed in Sections which follow.

Compounding such problems can be a lack of objectivity on the part of a family financial fiduciary regarding his or her legal responsibility to communicate with estate and trust beneficiaries. Family fiduciaries often feel that other family members should simply trust them, even to the extent of not expecting receipt of a copy of the governing instrument or an inventory or accounting of the estate or trust. A request by another family member for an accounting, for a response to an inquiry regarding the estate or trust inventory, or even a simple question regarding the administration of the estate or trust is often viewed by the family financial fiduciary as a "breach of trust" or unwelcome challenge to the fiduciary's veracity.

In short, children serving as financial fiduciaries tend to suffer the same malady leading to familial discontent as do their parents, i.e., improperly viewing trust and estate administration by a family fiduciary as being strictly a "family matter" and thus unbridled by administrative fiduciary responsibilities or other "legal technicalities."

Disharmonious family factors are endemic in the administration of an estate or trust even in circumstances where the family fiduciary is making a good faith attempt to diligently and even-handedly discharge fiduciary responsibilities. In situations where this is not the case, beyond engendering acute family disharmony, deleterious consequences to both the value of the assets being administered and to the integrity of the estate plan are likely to result. Less than impartial family fiduciaries are often tempted to manipulate the decision-making process to exact retribution on other family members or, more commonly, simply for their own personal gain.²⁰

20. This can involve transactions between the fiduciary and the estate or trust. Transactions between the trustee in a fiduciary capacity and the fiduciary in an

For example, family fiduciaries who are investment advisors (often named as financial fiduciary for that very reason) may invest estate or trust assets in a manner that maximizes their personal return rather than investing to achieve the optimum and secure return for the estate or trust. The same improper economic manipulation can be occasioned when a family fiduciary is leasing estate or trust property or is an employee or manager of a farm or closely held business in which the estate or trust has an ownership interest. A family fiduciary or members of the family fiduciary's family may use estate or trust property, e.g., the personal residence or motor vehicles, without the payment of proper consideration. Blatantly biased family fiduciaries may choose to interpret ambiguous dispositive provisions in the testamentary

individual capacity, or with a third party in which the trustee has an economic interest, would normally violate fiduciary duties unless authorized under the terms of the instrument. Even if authorized under the terms, such transactions normally violate fiduciary duties if the terms did not comport with a prudent transaction. *See, e.g.*, UNIF. TRUST CODE § 802 (amended 2004), 7C U.L.A. 588-89 (2006) (discussing duties and powers of trustees). Included in duties of a trustee are duties of loyalty, impartiality, and prudent administration of the trust estate, which would preclude investing trust assets where there are situations of conflicts of interest. *See, e.g., id.* More particularly, unless waived by the terms of the trust, transactions entered by the trustee for the trustee's own personal account are voidable. *Id.* at § 802(b). In addition, a transaction is voidable if it was between the trustee and a party in which the trustee has an economic interest, and a trustee shall invest and manage assets solely in the interests of the beneficiaries. *Id.* at § 802(c)(4). Also, "[a] trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." UNIF. PRUDENT INVESTOR ACT § 5, 7B U.L.A. 34 (1994). This is not limited to a setting entailing self-dealing or conflict of interest in which the trustee would personally benefit from the trust. *Id.* at § 5 cmt. These provisions were derived from the prudent investor rule. *See* RESTATEMENT (THIRD) OF TRUSTS § 227 (1992). However, this proscription is probably not applicable to professional services rendered by a trustee in a capacity other than as trustee. UNIF. TRUST CODE § 802(h) (amended 2004), 7C U.L.A. 588-89 (2006) (creating exception from general proscription for compensation paid to trustee that is "reasonable" and "fair to all beneficiaries"). There is nothing to indicate that this exception applies only to compensation paid to the trustee in the capacity as trustee, which would render the exception meaningless. In this regard, a comment in the most recent tentative draft of Restatement (Third) of Trusts Section 78 provides that "[i]t is reasonable to expect that a trustee who possesses special skills and facilities that are useful in trust administration will use those skills and facilities in administering the trust, and also to expect that the trustee's familiarity with the purposes and affairs of the trust will result in efficiency and cost advantages to the trust." RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(5) (Tentative Draft No. 4, 2005); *see also* Corcoran v. Thomas, 374 N.E.2d 329 (Mass. App. Ct. 1978) (holding trustee was not precluded from receiving brokerage commissions charged by administrator in administrator's capacity as broker as long as commissions were reasonable).

instrument strictly in their favor. They also can be inclined to ignore the dictates of the testamentary instrument with regard to estate or trust distributions in favor of substituting their own judgment as to what the decedent "really intended." Most veteran estate planners are likely to have experienced more than one circumstance in which a child malefactor has even embezzled funds or otherwise diverted estate or trust assets for their own personal benefit. Regrettably, the frequency of the foregoing types of occurrences does not appear to be on the decline.

FIDUCIARY FEE ISSUE

Family members frequently disagree on whether a family member serving as financial fiduciary should take a fee and, if so, what amount is reasonable. Irrespective of the complexity of the task or the time commitment demanded in managing an estate or trust, siblings of the family fiduciary frequently expect the family fiduciary to take no fee for services performed for what they, like their parents and their sibling serving as financial fiduciary, have concluded to be strictly a "family matter." A family member who serves for no fee can resent this attitude, particularly when, as is all too often the case, other family members display a palpable lack of appreciation of the fiduciary's efforts.

This adverse attitude on the part of children not named as fiduciaries to a child receiving a fee for fiduciary services can be mollified to a certain extent by including a provision in the testamentary instrument and financial power of attorney setting forth with particularity the parent's intent that the family financial fiduciary should receive a fee for services rendered and perhaps additionally specifying the amount or percentage fee the parent deems reasonable.²¹ However, inserting such a

21. Although helpful in evincing a parent's intent, a specified fee may not be legally controlling under governing state law. See UNIF. TRUST CODE § 708, 7C U.L.A. 580 (2004) (stating that "[i]f the terms of a trust specify the trustee's compensation, a trustee is entitled to be compensated as specified, but the court may allow more or less compensation if: (1) the duties of the trustee are

testamentary provision cannot ensure that the other children will not resent a sibling who accepts remuneration, even if it is parent-sanctioned.

FIDUCIARY LIABILITY ISSUE

Beyond the foregoing disharmonious consequences frequently encountered when a child serves as a financial fiduciary, a family fiduciary can be subject to liability to the other beneficiaries of the estate or trust for unintended errors in asset management.²² Personal liability can be both financially and emotionally devastating to a family member serving as financial fiduciary. For this reason, after being counseled on this issue, most parents will choose to relieve a child from fiduciary liability under the provisions of the testamentary instrument regarding actions that are merely negligent. Generally, such exculpatory clauses are judicially honored.²³ However, such

substantially different from those contemplated when the trust was created; or (2) the compensation specified by the terms of the trust would be unreasonably low or high." Nineteen states have enacted the Uniform Trust Code: Alabama, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Tennessee, Ohio, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Wyoming, and the District of Columbia. See Unif. Law Comm'rs, A Few Facts About the . . . Uniform Trust Code, http://www.nccusl.org/Update/uniformact_faclsheets/uniformacts-fs-utc2000.asp (last visited Mar. 24, 2007). Under common law, the general principle seems to be that "a trustee is entitled to compensation for his or her services as trustee, unless otherwise provided by the terms of the trust, and is also entitled to reimbursement for expenses incurred." *In re Estate of Moring v. Colo. Dep't of Health Care Policy & Fin.*, 24 P.3d 642, 647 (Colo. Ct. App. 2001) (citing RESTATEMENT (SECOND) OF TRUSTS §§ 242, 244 (1959)). "It is a general principle that a trust estate must bear the expenses of its administration." *Id.* (citing *Kuhn v. State*, 924 P.2d 1053 (Colo. 1996)).

22. See UNIF. TRUST CODE § 1008 cmt. (amended 2004), 7C U.L.A. 654-55 (2006) (discussing how trustees generally are liable for breach of trust).

23. See, e.g., *id.* Such an exculpatory provision is not enforceable if it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference or was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor. *Id.* at § 1008(a); see also RESTATEMENT (SECOND) OF TRUSTS § 222 (explaining that settlor cannot exculpate trustee for profit that trustee made from trust). Also, as a general rule, a trustee is not liable to a beneficiary for breach of trust unless the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach. UNIF. TRUST CODE § 1009 (amended 2001), 7C U.L.A. 656 (2006). However, an exculpation is invalid if "induced by improper

exoneration tends to exacerbate the rancor of other family members who may thereby be left without redress for damages suffered as a result of the fiduciary's actual or perceived mismanagement of the estate or trust.

The uncommon alternative strategy of exposing a family member to liability for the improper management of an estate or trust will not necessarily provide an adequate remedy for aggrieved family members. Beyond the costs of securing a settlement or judgment, in the situation where a parent has not required a family fiduciary to post bond²⁴ to minimize administrative costs, a family fiduciary who is held liable often either will possess insufficient assets to satisfy the liability or will be able to avoid the liability entirely by filing bankruptcy.²⁵

Thus, whatever approach a parent takes to allocate the risk of loss in this situation, whether the family fiduciary or other beneficiaries are to bear the risk, any significant economic loss that the family fiduciary or other beneficiaries incur from the actual or perceived improper management of the estate or trust is likely to cause irreparable damage to the relationship between the family fiduciary and other beneficiaries. This risk to family harmony is avoided entirely by appointing an independent third party as financial fiduciary. A bonded third-party fiduciary, or fiduciary of substantial net worth, should also assure adequate economic compensation in the event of any fiduciary mismanagement.

conduct of the trustee . . . or . . . the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach." *Id.*

24. See UNIF. TRUST CODE § 702, 7C U.L.A. 563 (2000) (providing that trustee bond is required "only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement," and that court may specify amount and whether sureties are necessary). This provision of the UTC is consistent with the position of the Restatement (Third) of Trusts, which is applicable in the absence of a statutory provisions addressing a bond requirement, and provisions of the Uniform Probate Code.

25. See 11 U.S.C.A. § 523(a)(4) (2000) (providing exception from dischargeability of debts in bankruptcy for "fraud or defalcation while acting in a fiduciary capacity").

"PERFECT STORM" SCENARIOS

The above discussed risks to family harmony are significant in almost every context when a child who has an adult sibling or adult step-sibling who is a beneficiary of the parent's estate or trust is appointed as financial fiduciary of a parent's estate. However, three estate planning situations bear special mentioning both due to their prevalence and because they incur a much higher than average risk of causing family disharmony.

The first such perilous situation occurs when a child is not only named as co-trustee with the surviving spouse on a testamentary trust²⁶ created by the predeceased spouse for the benefit of the surviving spouse, but also is named to serve as sole trustee of such testamentary trust and sole financial fiduciary of the surviving spouse's estate or trust following the death or disability of the surviving spouse. This situation frequently presents itself even under estate plans devised by competent, experienced estate planning attorneys.

By so doing, parents incorporate into their estate plan almost every conceivable fiduciary factor antithetical to the maintenance of family harmony. In addition to the risks previously discussed when a child is named as financial fiduciary, this plan poses acute disharmony risks between the child serving as co-financial fiduciary and the surviving spouse regarding various testamentary trust administration issues. This includes potential disagreements over investment decisions and whether discretionary distributions should be made to the surviving spouse. In effect, such a co-fiduciary relationship places the surviving spouse in the subservient, uncomfortable, and compromising position of having to seek his or her child's approval with respect to the investment and discretionary distributions of parental assets for the parent's own benefit.

26. "For the sake of convenience, the author is liberally using the term "testamentary trust" throughout this article not only to reference trusts created by a decedent under the provisions of the decedent's will, but also as settlor under the provisions of a revocable trust."

Moreover, as the child serving as financial fiduciary normally has a remainder interest in the testamentary trust, the child may not be objective about the need of the parent's spouse for discretionary trust distributions for health, maintenance, and support needs. The child may be particularly biased in his or her own favor regarding any discretionary distributions to descendants of the surviving parent authorized under the provisions of the testamentary trust. Even if the child was otherwise prone to be objective, the ability to provide unbiased advice and be an impartial decision-maker will have been compromised from the outset by the familial relationship between the co-fiduciaries. At the time objectivity would be most needed, i.e., when the parent would otherwise make an imprudent fiduciary decision regarding a significant trust administration issue, many children would be understandably reluctant to give advice contrary to that of their parent's position and thereby risk parental displeasure and its attendant adverse consequences.

The author has been both involved in and known of situations in which this co-fiduciary relationship has become so acrimonious, both in the circumstance when a child was rendering objective advice as well as when the child was acting predominantly in the child's self-interest, that the parent considered disinheriting the child serving as co-trustee with regard to their own trust or estate and exercising in favor of other appointees a power of appointment the surviving spouse possessed over the testamentary trust estate. This risk of disinheritance (and potential litigation arising therefrom following the parent's death) can be more than *de minimis* in nature, particularly if there is a period of parental diminished capacity sufficient to impair parental objectivity but insufficient to cause the parent to lack the rather limited capacity necessary to amend his or her estate plan.²⁷

27. The capacity to execute a will is less than that required to responsibly manage one's financial affairs or provide for one's person so as to be able to defeat a petition to appoint a legal guardian or conservator. Testamentary capacity

Other children may become distrustful, resentful, and jealous of this close fiduciary relationship between their sibling and parent, and they also may become suspicious that the co-fiduciary sibling is either unduly influencing the surviving parent regarding estate disposition or exercising fiduciary authority for his or her own economic benefit. To the extent any other children are disfavored in any respect under the estate plan provisions, this suspicion will be confirmed in the disfavored siblings' minds, greatly increasing both family disharmony and the risk of a legal challenge. The siblings of a child serving as co-fiduciary also will often strongly disagree with fiduciary decisions made during the lifetime of the surviving parent, particularly regarding decisions involving any authorized discretionary distributions to descendants and decisions rendered during any period of a parental disability when their sibling was serving as sole trustee.

Finally, the child serving as co-trustee over time will ineluctably become acutely familiar with the financial resources of the child's parents, as well as all important aspects of their estate plans. As opposed to other estate planning contexts, such knowledge is more likely to be shared with other children by either the surviving parent or the child serving as co-fiduciary. As a consequence, this situation likely will be imbued with all of the accompanying family harmony risks addressed in a subsequent Section of this article when parents impart knowledge of their estate plans to their children.

In sum, if it is desirable for prudent asset management or

normally only requires a testator to have sufficient mental capacity to know the natural objects of his bounty, comprehend the kind and character of his property, understand the nature and effect of his act, and make a disposition of his property according to some plan formulated in the testator's mind. 79 AM. JUR. 2D *Wills* § 63 at 321 (2002). Some courts have held that less capacity is required to execute a will than any other legal instrument. *Will of Goldberg*, 153 Misc.2d 260, 582 N.Y.S.2d 617 (Surrogate. Ct. 1992). With regard to the capacity to execute a revocable trust, in some states a higher capacity, contractual capacity, has been required. *See, e.g., Hilbert v. Benson*, 917 P.2d 1152 (WY. 1996). Section 601 of the Uniform Trust Code, consistent with the provisions of RESTATEMENT (THIRD) OF TRUSTS, Section 11(1)(Tentative Draft No. 1, approved 1996), provides that the requisite capacity to execute a revocable trust is the same as that required to execute a will.

preserving plan integrity for there to be a co-trustee serving in a fiduciary capacity with the surviving spouse under the provisions of a testamentary trust, it is normally strongly advisable that a knowledgeable third party be appointed to serve in such capacity, both for family harmony reasons and to ensure the rendering of competent, objective advice. The foregoing adverse consequences are rendered even more dysfunctional and acrimonious should a parent at the suggestion or with the acquiescence of their legal counsel, as the author has seen on more than a few occasions, have the temerity to name a child to serve as co-financial fiduciary with a surviving step-parent.

The second problematic situation occurs when a parent names a child as financial fiduciary of the parent's estate or trust and also as financial fiduciary of a trust created following his or her death to hold assets for the benefit of a sibling not under a legal disability. The impetus for the creation of the trust may be the sibling's financial or emotional immaturity, a psychological problem, or chemical dependency. Whatever the reason, this situation also incorporates the previously discussed detriments to family harmony in naming a child to serve as financial fiduciary. It has the additional risk of creating or aggravating an already acrimonious relationship between the child serving as financial fiduciary of a sibling's trust and the child who is the beneficiary of the trust.

The child who is the beneficiary of a trust is highly likely to resent the child's sibling for being appointed fiduciary of their parent's estate or trust. The child likely will also resent, to a much greater degree, the child's sibling being named as trustee of his or her trust with the authority to determine the propriety of trust distributions for his or her benefit. In addition to irreconcilable sibling differences, which are likely to be thereby occasioned and the emotional trauma both siblings are likely to be required to endure as a result, considerable litigation costs may be incurred.

The third precarious family harmony situation is in the

context of a husband and wife who are leaving their collective property upon the death of the survivor to the children and step-children of each parent. Obvious to most parents and their counsel in that situation is that naming a child of only one parent as financial fiduciary is likely to create an intolerable dysfunctional atmosphere at the outset. However, rather than taking the more prudent route of naming an independent financial fiduciary, the oft-chosen parental fiduciary strategy, which much too frequently is unquestioningly implemented by their estate planning counsel, is to balance competing interests between the children of each parent by naming a child and step-child of each parent as co-fiduciaries.

This approach is almost always ill-advised. It likely will create an immediate polarization, frequently resulting in highly-charged disagreements between warring factions of the children and step-children of each parent. Such disagreements can result in an administrative deadlock. Although family harmony between children and step-children is normally valued to a much lesser extent than among children, such factional confrontations nonetheless can be emotionally exhausting to the participants and financially draining to a parent's or stepparent's estate or trust, particularly should they result in litigation.

BURDEN PLACED ON FAMILY FIDUCIARY

Beyond family harmony risks, practitioners should counsel clients to consider the burden they are placing on children by naming them as financial fiduciaries.²⁸ The financial fiduciary must undertake complex, time-consuming administrative tasks for which they normally lack experience. Such tasks include determining the nature and extent of the parent's assets, how parental assets are titled, and the parent's outstanding liabilities.

28. See HUNT & HUNT, *supra* note 6, at 125-27 (discussing the complexity of handling and distributing estate and how corporate executors could avoid potential problems involving family disputes).

Financial fiduciaries also must liquidate assets and pay bills appropriately, ensure proper compliance with all necessary tax filings, manage and investigate assets, and make distributions of the estate or trust assets to the appropriate parties. A child must interrupt his or her personal and work schedule to attend to these matters. This burden can become even more onerous when the child does not live near the parent and needs to make multiple trips to the parent's place of residence to properly administer the estate or trust.

Children normally have the mistaken impression that serving as a fiduciary of their parent's estate is some sort of "plum." They also may be gratified by filial approval implicit in such appointment. However, most children who serve in such capacity quickly come to realize that serving as a financial fiduciary of a parent's estate is a burden, the purported benefits of which can be quite illusory. Family fiduciaries are often asked to undertake this burdensome job without receiving remuneration or even a scintilla of appreciation from other family members.²⁹ This burden will be substantially increased should family fiduciaries become the object of the abject jealousy of siblings or have to endure the often unfair and biased criticism of siblings and their spouses.

Naming a child as financial fiduciary brings to mind the "Far Side" comic strip in which its illustrator, Gary Larson, depicted two deer in a sylvan setting.³⁰ One deer had a bulls-eye conspicuously emblazoned across his rib cage.³¹ This, in turn, prompted his ruminant companion to remark, "Bummer of a birthmark, Hal!"³² Children serving as financial fiduciaries of their parent's estates or trusts are likely to feel they are not dissimilarly situated.

29. The author has asked numerous clients who served as financial fiduciaries for their parents' estates or trusts if their siblings expressed any appreciation. Rarely has this question been answered in the affirmative and often the client's first response is one of laughter.

30. GARY LARSON, *THE FAR SIDE GALLERY* 3, 153 (1988).

31. *Id.*

32. *Id.*

BENEFITS AND COSTS OF THIRD-PARTY FIDUCIARY

Placing an independent and financially-astute fiduciary at the forefront of administrative decisions following the disability or death of a parent greatly reduces family stress and risk of family disharmony in the administration of the parent's estate or trust.³³ Competent third-party fiduciaries normally possess professional objectivity and are well experienced in the fiduciary matters that devolve upon them to perform.

Compared to most family members, independent financially-sophisticated fiduciaries will achieve a greater investment return on average, maintain better records, make more astute income and estate tax decisions, provide more accurate and informative accountings, and possess a greater knowledge of the complex laws governing the administration of estates and trusts. Although family members can secure the same result by securing competent investment, tax, and legal advice, such advice comes at an additional cost, and family members frequently either will fail to seek such advice or secure it from less competent professionals.

Clients understandably fear that naming a non-family member to serve as financial fiduciary will result in substantial additional costs that will materially reduce the value of their estates or trusts passing to family members. Experienced estate planning counsel know this to be an abnormal occurrence. A knowledgeable and experienced third-party financial fiduciary frequently will result in an increased amount of estate or trust assets passing to family members.³⁴ The third party's fiduciary fee can be offset by better asset management, and an experienced third-party financial fiduciary saves by requiring less counseling from accountants and attorneys and through other administrative efficiencies. When compared to fees and costs incident to a fractious and litigious family situation

33. See HUNT & HUNT, *supra* note 6, at 125.

34. See I. Mark Cohen, *Appreciating Individual Trustees*, 145 TR. & EST. 32, 32-33 (discussing how corporate trustee and individual trustee have similar costs, but corporate trustee can take advantage of his or her competency).

surrounding the appointment of a family financial fiduciary, the cost of a third-party financial fiduciary almost invariably would be substantially less.

Finally, as noted above, to avoid burdening the estate or trust with the cost of a bond, a parent's testamentary instrument normally absolves a family fiduciary from posting bond. Compared to naming a bonded corporate fiduciary or third-party individual fiduciary of substantial net worth, this decision normally exposes the estate or trust to uncompensated losses resulting from the fiduciary's improper management of the estate or trust.³⁵

Depending upon the value of assets, their complexity, liabilities of the estate or trust, and the nature of the dispositive provisions of the testamentary instrument, third party fiduciary fees for post-death administration of a parent's estate or trust would normally be expected to range between one-half of one percent and three percent of the value of the assets. The larger the estate or trust, the smaller would be the expectant percentage fee. Fiduciary fees generally are somewhat higher for any property that must pass through probate.³⁶ Such fees are normally deductible as administrative expenses for either estate tax or income tax purposes, thus reducing their after-tax cost.³⁷

35. See generally UNIF. TRUST CODE § 702, 7C U.L.A. 563 (2004) (discussing when trustee bond is required).

36. See John J. Scroggin, *Solving Nine Common Estate Planning Problems*, NAT'L UNDERWRITER, Jan. 3, 2000, at 7, 20 (discussing that most states provide for statutory executor's fee that ranges from two percent to five percent of the asset value in probate estate).

37. I.R.C. Section 212 generally permits expenses related to the production of income to be deducted for income tax purposes. See *Rudkin Testamentary Trust v. Comm'r*, 467 F.3d 149 (2d Cir. 2006) (discussing whether that portion of the fees consisting of investment advisory fees is subject to the "2% floor" for miscellaneous itemized expenses under Section 67(a) of the Code). The Internal Revenue Code provides that funeral expenses, administration expenses, claims against the estate, and certain amounts for unpaid mortgages are not to be included in the gross estate for purposes of the estate tax. I.R.C. § 2053 (2006). However, there is a limitation on such deduction for both estate and income tax purposes. I.R.C. § 642(g) (2006). "[A]mounts allowable under section 2053 or 2054 as a deduction in computing the taxable estate of a decedent shall not be allowed as a deduction (or as an offset against the sales price of property in determining gain or loss) in computing the taxable income of the estate or of any other person, unless there is filed, within the

Even if an additional after-tax cost results from naming an independent financial fiduciary, such cost should be weighed in consideration of attendant family harmony and burden-relieving benefits. A very small percentage net financial fiduciary fee compares quite favorably with other percentage fees routinely paid for expertise on investment management. Third-party fiduciary fees generally are relatively inconsequential when compared to the much higher commissions paid routinely on the sale of real property. Real estate commissions are paid by property sellers for essentially the same reason non-family members are named as financial fiduciaries: to avoid burdening an inexperienced person with a task better suited to an experienced professional. Significantly higher real estate commission fees are deemed reasonable and acceptable in the marketplace, notwithstanding the fact that selling real property normally is a less complex and less time-consuming task than administering an estate or trust. Moreover, the services of a realtor or investment advisor obviously do not provide any tangible family harmony benefit.

SELECTION OF THIRD-PARTY FIDUCIARY

The selection of an independent financial fiduciary should be based primarily on capability, experience, and reputation, and only secondarily on fees.³⁸ When going "outside the family" in naming a financial fiduciary, clients often lean toward selecting personal financial advisors or other family members, including siblings. However, such individuals may be financially unsophisticated, normally are inexperienced in managing an estate or trust, and they often have insufficient time available to address their responsibilities. Such

time and in the manner and form prescribed by the Secretary, a statement that the amounts have not been allowed as deductions under section 2053 or 2054 a waiver of the right to have such amounts allowed at any time as deductions under section 2053 or 2054." *Id.* Section 642(g) does not apply to deductions related to income with respect to a decedent. I.R.C. § 691 (2006).

38. HUNT & HUNT, *supra* note 6, at 126.

responsibilities are burdensome on family members, and the naming of a personal financial advisor as financial fiduciary can present an economic conflict of interest. Consequently, the search for an appropriate third-party financial fiduciary frequently will focus on a bank with trust powers, an independent trust company, or a certified public accountant (CPA).³⁹

Attorneys certainly are at least equally capable of serving as financial fiduciaries.⁴⁰ However, depending upon the circumstances and the particular attorney under consideration, an attorney may not be the most desirable nominee. Many estate planning attorneys simply do not enjoy serving as fiduciaries because they are planners and strategists by nature and not administrators. A client naming the client's estate planning attorney as financial fiduciary is somewhat akin to a developer requesting the architect who planned and designed a large office building in the development to serve as building administrator. Even if the compensation was comparable, most architects would be expected to quickly demur such employment in favor of the greater challenge and personal satisfaction they derive from their chosen profession. Similarly, if a fiduciary does not enjoy the administrative aspects of managing an estate or trust, such fiduciary is not likely to perform at their optimum ability level. Moreover, unless a law firm has an adequately staffed internal department for the specific purpose of supporting financial fiduciary services, an attorney may not individually have the experience, support staff, or internal controls and procedures necessary to

39. Unless fiduciary liability is covered by the CPA's malpractice insurance, the client should consider requiring the bond posting. It also is helpful if the CPA has past investment experience.

40. See generally ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 95 (Fourth ed., 2006) (outlining that no model rule directly addresses the propriety of a lawyer preparing a document that appoints him or her to a fiduciary position, an attorney may do so as long as the client is informed, the appointment does not violate the model rules conflict of interest provisions, and the appointment does not stem from undue influence or improper solicitation) [hereinafter COMMENTARIES ON THE MODEL RULES].

competently and economically handle the investment, accounting, and other administrative aspects required of estate and trust administration.

Finally, although there is no ethical conflict in an estate planning attorney who drafted the instrument serving as a financial fiduciary,⁴¹ the beneficiaries may, nonetheless, not welcome this situation. Beneficiaries may suspect that the attorney is administering the estate or trust in contravention of the parent's intent, or they may question whether any exculpatory clauses shielding the financial fiduciary from liability are legally proper and were fully understood by their parent.⁴² They also may view an attorney's decision to serve in the dual role of both financial fiduciary and legal counsel to be purely self-serving⁴³ or conclude that the attorney would not

41. With regard to MRPC 1.7, a client generally is free to select whomever he or she wishes to serve in such capacity, and lawyers are permitted to assist adequately informed clients who desire to appoint their lawyer as a fiduciary as long as such appointment is not the product of undue influence or improper solicitation. COMMENTARIES ON THE MODEL RULES, *supra* note 40, at 95. Forty-six states have adopted the Model Rules. *Id.* at 10. However, the COMMENTARIES note that such appointment will implicate Model Rule 1.7. *See id.* at 95. The first implication is if there is a "significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary." *Id.* For the client to be properly informed on this issue, the client must be "provided with information regarding the role and duties of a fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary." *Id.*

42. *See* UNIF. TRUST CODE §1008(b), 7C U.L.A. 563 (2000) (providing that exculpatory provision drafted or caused to be drafted by trustee is invalid and constitutes abuse of fiduciary or confidential relationship unless trustee proves both that provision is fair under the circumstances and that it was adequately disclosed to settlor).

43. Regarding MRPC 1.2 entitled "Scope of Representation and Allocation of Authority Between Client and Lawyer," "[s]ome states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as

notify estate or trust beneficiaries of any errors or omissions in the testamentary instrument that the attorney had drafted. These concerns on the part of beneficiaries can be lessened by having an attorney serve as a co-fiduciary with an independent co-fiduciary, but obviously not without the incurrence of additional fiduciary fees.

The foregoing considerations, plus that any liability or costs to defend against accusations of liability may not be covered by the specific malpractice policies involved, lead many attorneys to dissuade their clients from naming them as fiduciaries, notwithstanding the substantial remunerative benefits which accompany such appointment.

PROVIDING FOR FAMILY INPUT IN THIRD PARTY FIDUCIARY DECISION-MAKING

If a client decides to name an independent financial fiduciary, the client need not totally eschew the input family members in the estate or trust administration process to maximize administrative competency and the preservation of family harmony. The parental desire for family input normally distills down to a concern that in the absence of such input, the estate or trust is at a significant risk of being improperly administered. This concern may result from an incorrect perception or irrational fear that a financial fiduciary has such broad discretion, that even under a well-drafted testamentary instrument, the fiduciary could legally thwart the client's intent as to the management or distribution of the estate or trust.⁴⁴ In a

the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa." COMMENTARIES ON THE MODEL RULES, *supra* note 40, at 36-37.

44. The Uniform Trust Code outlines the various powers of the trustee as fiduciary. See UNIF. TRUST CODE § 814, 7C U.L.A. 620 (amended 2004) (explaining the discretionary power of the trustees and limits on that discretion); *see also* UNIF. TRUST CODE § 815 (amended 2003), 7C U.L.A. 626 (2006) (discussing general powers of trustees, including all powers conferred by trust terms); UNIF. TRUST CODE § 816, 7C U.L.A. 627-30 (2000) (discussing specific trustee powers, including power to collect trust assets, buy and sell property, deposit trust funds, borrow money, and exercise rights as absolute owner over stocks or other securities).

properly drafted instrument, the parent's intent should be unambiguous and not subject to any significant variance in interpretation. In an ambiguously drafted instrument that creates adverse economic positions between or among children, the benefit in having an objective third-party financial fiduciary is at its apex. As previously discussed, this concern also may be the result of an erroneous assumption that the management of assets following a disability or death is primarily a "family matter" best handled by a member of the immediate family.

Nonetheless, providing for family input decisions in a "watchdog" role can provide a salutary "check-and-balance" on fiduciary administration and costs as well as reassure a parent that his or her estate or trust will be administered properly. One common method of providing family input involves the client naming a family member as co-fiduciary with an independent third party. Depending on the terms of the testamentary instrument and governing law, however, this may not limit the legal responsibility of the family member as a financial fiduciary. Moreover, if the family member co-fiduciary charges a fee, the total fiduciary fees will increase because third-party fiduciary fees normally are not reduced when a family co-fiduciary is serving. The attendant risk to family harmony due to a child taking a fiduciary fee likewise will increase.

Although having an independent co-fiduciary should reduce the burden of a child serving as financial fiduciary and diffuse much of the family volatility and suspicion that can otherwise accompany the appointment of a family fiduciary, it likely will not eliminate any jealousy or resentment component surrounding such appointment. Further, the family co-fiduciary will remain subject to recrimination from other family members regarding fiduciary decisions with which they should disagree.

Consequently, family harmony is optimized when family members are not directly involved in the estate or trust administration process. Instead of naming a child as co-fiduciary, a more desirable alternative may be to name the family member who otherwise would be the parent's choice as

financial fiduciary as a "fiduciary discharger."

Under the provisions of the testamentary instrument, the fiduciary discharger would possess sole discretionary authority to discharge the third-party financial fiduciary without cause and to name a successor third-party fiduciary, perhaps limited to a CPA or corporate fiduciary to ensure the competency and impartiality of the appointee.⁴⁵ This authority could be exercised, or at least threatened, if the fiduciary discharger disagreed with the financial fiduciary's fee, investment performance, management decisions, communication with beneficiaries, or any other aspect of the estate or trust administration. The fiduciary discharger also could fill a fiduciary vacancy at any time there was no named financial fiduciary willing and able to serve.

Employing the fiduciary discharger strategy puts the preferred family member or members in control of the party who or which is to serve as financial fiduciary without such party having the administrative burden or "family baggage" which would otherwise accompany the family member being named as sole fiduciary or co-fiduciary. As opposed to simply naming as fiduciary discharger the family member or members the parent would have otherwise named as financial fiduciary, a parent may instead wish to name all of the children as fiduciary discharger to give them all a feeling of involvement in the process, the collective decision of which could be determined by either a majority of the fiduciary dischargers or any desired greater percentage, including unanimous consent.

This quite limited and indirect role of children in the estate or trust administration process normally will not detrimentally

45. Corporate fiduciaries may have a fee schedule incorporating a fixed percentage "termination fee," which may be applied when this authority is exercised by a fiduciary discharger. Thus, it is usually prudent to include a provision in the trustee provisions of the instrument that in accepting the appointment of trustee, a trustee is prohibited from charging a termination fee when the trust is terminated or trustee authority is transferred to a successor trustee, as neither bear a direct relationship to the time and effort involved and would be unreasonable under such criteria.

impact family harmony or permit such input of children to cause any distortion in the proper administration of the estate or trust. Indeed, it should foster a positive feeling in children by giving them a participatory role in the administration of the parent's estate or trust, help assuage any negative feelings a child might otherwise have had by their parent naming an independent financial fiduciary, and hopefully confirm in children's minds that their parents named an independent financial fiduciary strictly for family harmony and burden-relieving reasons and not on account of any question concerning their judgment or competency. This strategy usually will satisfy a client's objective of ensuring proper estate or trust administration by providing for significant family input in the estate or trust administration process. In the author's experience a very high percentage of clients have concluded that this approach achieves the "best of both worlds."

Without a doubt, the greatest risk to family harmony occurs when a child serves as financial fiduciary during the post-death estate and trust administration period when a parent's assets are to be distributed to or for the benefit of children. Thus, in order to minimize administrative costs while accessing the benefits in naming an independent financial fiduciary at such time when most needed, parents may choose to name a child to serve as financial fiduciary during any period of their disability (usually only if their spouse is unable to serve), while appointing a non-family member to serve as financial fiduciary of the estate or trust upon the death of the surviving spouse. There certainly is some risk in this situation that other siblings may disagree on the management of the parent's estate by their sibling, the propriety of asset expenditures for the parent's benefit and whether the sibling is improperly benefiting from the management of a parent's estate. However, this risk normally pales in comparison to the more acute family harmony risks which accompany a child serving as financial fiduciary following the death of a parent when the administration of the trust or estate becomes much more complex and assets are to be

distributed to children. This hybrid approach is most efficacious in smaller estates, where the sophisticated asset management provided by third party fiduciaries is less imperative and clients have a much greater concern that fiduciary fees could substantially deplete their estates should they have to endure an extended period of disability.⁴⁶

ACHIEVING A BALANCED RISK/BENEFIT PERSPECTIVE

The risk to family harmony in appointing a child as financial fiduciary varies widely from family to family. However, parents are not detached from their own family situation and they may not be aware of all pertinent factors among their children and children's spouses that could negatively impact family harmony if a family fiduciary was named to serve. Parents typically also have little or no experience in family fiduciary matters. Thus, they usually are not objective or accurate prognosticators of the degree of such risk within their own family. They also can be far too precipitous in concluding that disharmony simply "cannot happen in my family."

Even in the most harmonious of families, naming a child as a financial fiduciary may tax family harmony mettle beyond its limit. Such families have much more to lose than families possessing a much lesser degree of harmony. In situations where significant family disharmony is extant during the lifetime of a parent, clients should give even greater consideration to selecting a non-family fiduciary. Injecting a

46. However, caution should be exercised in the above-discussed circumstance when this strategy would have a child serve as trustee of a "bypass" trust created by a predeceased parent for the benefit of a disabled surviving spouse which has "sprinkle" provisions authorizing unequal distributions to descendants of the surviving spouse, either in the discretion of the trustee or based upon need. In order to avoid both a disharmonious family situation and any abuse of discretion on the part of a child serving as trustee of such trust, a parent should consider including in the testamentary instrument a requirement that any such discretionary distributions made by a child serving as trustee be made equally among each class of beneficiaries consisting of each child and such child's descendants.

family fiduciary into an already disharmonious family situation may result in a contentious atmosphere at the outset, placing a greater burden on the family fiduciary and a greater strain on family harmony. The much greater risk of controversy and litigation in that situation could prove quite costly to the estate or trust.

Providing clients with an analogous risk/benefit situation can assist them in gaining a better perspective on this issue. For example, most individuals insure their tangible property of significant value from natural calamities, however remote the chance of such an occurrence. The author's Kansas clients insure their homes against damage from tornados routinely and without much afterthought, notwithstanding the very remote possibility that their particular residence, even though located in "tornado alley," would suffer any tornado damage during their lifetime. Even if they were given the option of culling tornado risks from their casualty homeowner insurance coverage, they would decline to do so. These individuals would reason that the payment of a relatively small insurance premium is worth the avoidance of having to otherwise assume a small risk of a significant casualty expense. Yet, notwithstanding the much greater risk of substantial damage to the valuable asset of family harmony occasioned by naming a child as financial fiduciary, these same persons will be inclined to give little consideration to "insuring" against family disharmony through the appointment of a third-party financial fiduciary. Pointing out this irony tends to give clients pause and make them much more reflective when selecting a suitable financial fiduciary.

An estate planning attorney is likely to receive a greater economic benefit if a family member, rather than an experienced third party, is named financial fiduciary. Children serving as financial fiduciary have a strong tendency to engage their deceased parents' attorney as fiduciary counsel. Moreover, family members normally require more legal advice, assistance, and back office support than third-party fiduciaries experienced in estate and trust administration. The potential need for

significant legal services is markedly increased by the much greater risk of significant family disagreements when a family member serves as financial fiduciary. Consequently, clients normally will appreciate that estate planning attorneys who counsel them to consider naming a third-party financial fiduciary are demonstrating both their objectivity and a resolute commitment to estate planning strategies that are in their clients' best interest.

DECISION MUST REST WITH CLIENT

Summarily stated, a client should not name a financial fiduciary unless the client has been both duly informed of, and has fully considered, all relevant aspects of the decision. In the author's experience a very clear majority of clients having more than one adult child and who have been properly counseled on these aspects will decide to abstain from naming a child as financial fiduciary in favor of a competent third party. Perhaps even more telling, the author has encountered a number of situations in which children who were duly informed during their parents' estate planning process regarding family harmony issues and the concomitant responsibilities and burdens of a financial fiduciary have advised their parents of a preference in serving as fiduciary discharger rather than as financial fiduciary. One would have a tendency to conclude that a significant percentage of duly advised children who nonetheless prefer serving as financial fiduciary are more likely than their abstaining counterparts to be motivated at least in part by factors inimical to the maintenance of family harmony, i.e., sibling rivalry or a desire for control.

Ultimately, however, such decision must rest with the client. Whether as a result of a reflexive conclusion that disharmony simply "cannot happen" in their particular family or following thoughtful analysis, there will be clients who do not waiver from their initial inclination to name a child as financial fiduciary. This is as it should be. From an estate planning attorney's perspective, it is for the well-informed client to decide

the appropriate course of action in his or her particular circumstances.

BEQUESTS OF FARMS AND OTHER CLOSELY-HELD BUSINESSES TO CHILDREN

Post-death disposition of farms and other closely-held businesses among descendants can severely test family harmony.⁴⁷ Issues that frequently arise in this context involve: (1) the orderly transfer of business management to a child or children, and (2) how shares should be equalized between or among a child or children, particularly when only some children receive the farm or closely-held business assets.

Emotional and psychological considerations are a substantial component of the tension placed on family harmony in the transition of business management and business interests to descendants.⁴⁸ The older generation often has a natural reluctance to "turn over the reins" of the business. To enhance the chances of success in business succession, the younger, succeeding generation normally must gain practical experience in business operations prior to the death of the older generation. Additionally, the older generation should observe levels of competency and potential sibling rivalries in the operational phases of the business.

Further stress is placed on family harmony in the transition of a closely-held business following a parent's death because of the conflicting values and needs of the family unit versus the

47. See generally William S. White, *Family Business Succession Planning: Devising an Overall Strategy*, 58 J. FIN. SERVICES PROF. 67 (2004) (discussing concerns of family-owned business as well as estate and tax planning strategies to prepare for passing the business to children).

48. *Id.* at 68 (discussing differences between family business planning and traditional estate planning because focus is on shifting control of business, as opposed to merely distributing wealth). Planners must distinguish between the children who are active in the business from those who are not, and they must help clients make decisions based on ability and competence of the successors to the business, as opposed to a decision based solely on equity. *Id.*

commercial realities of operating the business.⁴⁹ The focus on family values tends to be inward, whereas the focus of a business necessarily is on external factors existing in the marketplace.⁵⁰ Competitive factors usually dictate that compensation in a successful business be based upon performance and skill level, whereas the family is more inclined to desire equality in remuneration irrespective of these factors. This is one reason closely-held business interests are difficult to maintain from generation to generation. Such fundamentals must be carefully addressed to prevent irrevocable damage to family harmony in implementing the business succession plan.

As part of the business succession plan, a parent should consider which family members will receive business interests, when the family members should receive such interests, and the effect such ownership will have on dictating the family members who will serve in management positions. One of the biggest problems is determining the proper distribution of estate assets among children, some of whom participate in the business enterprise and others who do not.⁵¹

Not infrequently, parents want children who have been active in the success of the family business to receive a greater share of the total value of the estate in consideration of such efforts. In other circumstances, the parent wishes for all children to receive an equal share of the estate. In either situation, a serious predicament is presented if there are insufficient non-business assets to fund the desired shares of the estate passing to children not involved in the business.

A parent should understand the substantial risk of contentious opposing viewpoints that can arise between active and non-active family members regarding business decisions. Having both active and passive family members owning a closely-held business interest typically leads to disagreements adversely

49. *See id.*

50. *Id.*

51. *Id.*

affecting family harmony, the lion's share usually posited by passive family members.

To avoid such problems, the testamentary instrument or governing buy/sell agreement can require that the actively-participating family members purchase any value of the business interest in excess of their specified share of the estate or trust, which can be purchased either for cash or on an installment basis with a secured note.⁵² The family members receiving the business interest may consider purchasing a life insurance policy on the parent's life in order to provide sufficient liquidity with which to purchase such interest. The provisions of the testamentary instrument or buy/sell agreement should either specify such value or provide a mechanism for its determination, including whether it is appropriate to consider otherwise applicable fractional, lack of control, and lack of marketability discounts.⁵³

Often, considering discounts in determining fair market value can cause an unintended economic shift of the estate distribution among family members. For example, a discounted minority family business interest or fractional real property interest passing to a child's share under a parent's estate plan, when combined with the interest in the business or real property already owned by such child, may result in such recipient having a higher-valued controlling interest in the business or the entire interest in real property. If the intent under the instrument is to treat all children the same on an economic basis by creating "equal shares," this unintentional skewing of valuation may cause resentment among other family members and significant family disharmony.

Alternatively, an insurable parent could purchase a life insurance policy on the parent's life, either directly or indirectly by contributing funds to purchase the policy to a trustee of an irrevocable life insurance trust created for the purpose of excluding the insurance proceeds from the parent's taxable estate.

52. [1982] 2 FREDERICK K. HOOPS, FAMILY ESTATE PLANNING GUIDE 267, 272-75 (3d ed.) (discussing methods parents can use to give their business to a decedent).

53. *See id.*

This approach may provide sufficient non-business assets at time of death to fund the intended shares of inactive family members.⁵⁴

In situations where there is no viable or practical alternative but for a parent to give business interests to both active and non-active family members in satisfaction of their intended shares, a parent may choose to structure the estate plan so that the management of such business assets is reposed solely in the active family members, usually by incorporating voting and non-voting ownership interests in the business enterprise. To offset the preference of management duties and accompanying salary benefits given to the active children, a parent may opt to give passive family members preferential distribution rights on ownership interests. In addition, parents may choose to give non-active family members "put" rights to be able to compel active family members to purchase their interests in the closely-held business at a prescribed value and under specified terms of purchase. This put option could be made exercisable at any time, only after the expiration of a certain period, or under specific circumstances related to the economic circumstances of the business.

However, even with the inclusion of such compensating provisions, active and non-active family members who receive an interest in the family business are nonetheless likely to engage in frequent disagreements. Non-active family members may deem their periodic distributions inadequate and salaries of active family members excessive, or they may conclude that the business is imprudently managed. Thus, the most desirable estate planning structure from a family harmony perspective is clearly one that avoids ownership interests in a family-owned business passing to both active and non-active family members from the outset.

Many estate planners simply do not sufficiently address the foregoing factors when counseling their clients about the devolution of farms and closely-held business to their

54. See *id.* at 153-55 (discussing the functions and uses of insurance as an integral part of family estate planning).

descendants. Naming a child as financial fiduciary likely will exacerbate family tensions inherent in passing a closely-held business interest following a parent's death. Normally, the named fiduciaries in that situation are less than objective children who are active in the business. Such risks become even more acute if, as is usually the case under well-crafted estate and business succession plans, valuation determinations of business assets are made by the financial fiduciary in determining the satisfaction of estate or trust shares passing to children.

Parents can satisfy the goal of achieving the family harmony and burden relieving benefits in naming a third-party financial fiduciary without having to compromise an additional goal of permitting children who are active in the business to continue in such capacity following their death or disability. A child who is active in the business may be named as a "business fiduciary," i.e., as additional executor, trustee, or attorney-in-fact, whose sole fiduciary authority is managing the business during the applicable estate or trust administration period.

GIFTS TO CHILDREN

Parents often make periodic gifts to their descendants for various reasons, including to reduce their taxable estate, to satisfy a descendant's economic need, or merely for the personal satisfaction derived therefrom.⁵⁵ Nonetheless, family members may take issue with any parental distribution that they perceive to be unequal and therefore "unfair." Thus, a child who becomes aware of disproportionate parental lifetime gifts among children may object to a parent's dispositive plan that gives a preferred recipient of the parent's munificence during the parent's lifetime an equal share of the parent's remaining estate or trust following death.

If the parent does not desire for such gifts to be taken into account under the dispositive plan, the parent should provide in

55. *Id.* at 16 (discussing advantages of giving a gift).

the testamentary instrument that any gifts during the parent's lifetime should not be considered in determining a beneficiary's share of the parent's estate or trust.⁵⁶ In the absence of such a provision, a child's testamentary bequest normally is legally unaffected by any such inter vivos gifts.

However, without the inclusion of such provision in the testamentary instrument, children who were less proportionally benefited during a parent's lifetime may believe that a parent's failure to make an adjustment for the gift under the estate plan was an unintended oversight by a parent or an error by the drafting attorney. Just as importantly, in the absence of such a clarifying provision, a child is more likely to resent a sibling perceived to have received an unintended parental preference.

In the opposite circumstance, where a parent intends that gifts made to a child be taken into consideration in determining the child's share, the provisions of the testamentary instrument should specify the amount and date of each gift treated as an advance against a child's share, possibly with an interest component.⁵⁷ If ongoing advances are possible, the testamentary

56. Some states adhere to the rule that "[p]arol evidence is not permitted to be used to prove that a testator intended an inter vivos gift to be an advancement toward, or ademptive of, a devise in the testator's will, but rather proof of an ademptive gift is limited to a recitation in the will that the value of the lifetime gift is to be deducted from the beneficiary's devise, or the testator's writing contemporaneous with the gift that its value is to be deducted from the devise or is in satisfaction of the devise, or the devisee's acknowledgment in a writing contemporaneous with the gift that it is in whole or in part satisfaction of the devise." 80 AM. JUR. 2D *Wills* § 1483 (2002). Other states allow for the admission of parol evidence but place the burden of proof on those asserting an advancement, traditionally referred to as an ademption by satisfaction. See 97 C.J.S. *Wills* § 1768 (2004); see also *Trs. of Baker Univ. v. Trs. of the Endowment Ass'n of Kan. State Coll. of Pittsburg*, 564 P.2d 472, 480-81 (Kan. 1977). As a practical matter, in the context of the issue of whether gifts to children constitute an ademption, it should make little practical difference which rule is followed. Even if parol evidence is admissible to establish that gifts to children were intended to be ademptive, such evidence would have to include a statement by a parent or other evidence that a gift to a child was so intended. It would be a highly unlikely scenario that any such statement would be made by a parent or any other action would be taken by a parent making a gift to a child which would evince an ademptive intent in the common situation where bequests to children are not of a specific amount but rather of portions of an estate or trust.

57. Although the terms are used interchangeably, strictly speaking, the term "advancement" applies in situations when the decedent dies intestate, and

instrument should provide a "bright line" mechanism for so determining, such as specifying in the testamentary instrument that such advancement treatment shall also apply to any subsequent checks issued to family members where it is either noted on the check or in the parent's financial records indicating the amount of the gift and that such gift was to be treated as an advancement.

In addition to the negative family harmony consequences that may arise from parental gifts following a parent's death, adverse consequences also may arise as a result of gifts made during a parent's lifetime. When parents make annual exclusion gifts to their children and their children's spouses to reduce the size of their taxable estate,⁵⁸ it is difficult to devise a method that every child will perceive to be fair and equitable. Unless there are an equal number of donees in each family unit consisting of a child, the child's spouse, and the child's descendants, gifts to all descendants and spouses of children on an equal, per-capita basis will result in disparate total amounts of gifts between or among family units.

Should a parent under the estate plan desire that each family unit ultimately is to receive an equal amount after factoring in inter vivos gifts, a parent could provide for appropriate adjustments under the provisions of the testamentary instrument. Such adjustments can become quite complicated if they include "time value of money" adjustments to approximate economic parity. However, whatever the parental decision in this regard, whether to make such a

"ademption" applies to testate situations. "An ademption by advancement results when a parent, after the date of the will, makes a gift to a child in substantial amount of similar property" bequeathed in the will. 80 AM. JUR. 2D *Wills* § 1480 (2002). In the context used by the author, the term "advancement" means that the gift is treated as if it was still part of the parent's estate or trust in determining the child's share and deemed distributed in satisfaction of such share in the same manner as an ademption.

58. See Treas. Reg. § 25.2503-6 § 25.2503-2 (2006). The annual gift tax exclusion is adjusted annually for inflation in increments of \$1000. The exclusion amount in 2007 is \$12,000. See Internal Revenue Service, Tax Law Changes for Gifts and Estates and Trusts, http://www.irs.gov/formspubs/article/0,,id=112782,00.html#gift_excl_2007 (last visited Mar. 16, 2007).

testamentary adjustment or not, a child may be left with the feeling that he or she was unfairly penalized simply due to having more or less family unit donees than a sibling.

Significant gifting, for purposes other than for paying medical or educational expenses,⁵⁹ also may detrimentally affect the relationship between a parent (or grandparent) donor and a child (or grandchild) donee. The donor may resent the donee's unwise expenditure or injudicious management of the gift. Much to the donor's chagrin, a donee's initiative, ambition, normal maturational development, and financial independence may become stifled because of substantial outright gifts.⁶⁰ Descendants who receive substantial gifts in their formative years tend to possess lower self-esteem, under-achieve, and be less financially responsible.⁶¹ Donees who exhibit such negative traits also may be less self-reliant, more self-centered, distrustful of others, and inclined to blame others for their own failures.

A donor also may become disenchanted with a donee's lack of appreciation of the donor's beneficence. Should the donor subsequently desire to cease or reduce gifts, a donee who has relied on such gifts may become resentful. These risks are increased when the donee develops a high level of gift expectancy, such as when substantial monetary gifts are routinely made at a certain time of the year, such as Christmas. The donee may even have made significant expenditures in anticipation of the receipt of such gift. Finally, a pattern of gifting may cause a child to consider the inheritance of parental assets as an entitlement. This level of expectancy both heightens intra-family tensions during the donor's lifetime and adversely affects the preservation of family harmony following a parent's

59. Section 2503(e) of the Internal Revenue Code excludes gifts made directly to providers and institutions for medical and tuition expenses from being taxable for federal gift tax purposes. Treas. Reg. § 25.2503-6 (2006).

60. See, e.g., HUNT & HUNT, *supra* note 6, at 125-27; THOMAS J. STANLEY & WILLIAM D. DANKO, *THE MILLIONAIRE NEXT DOOR* (1996); STANLEY D. NEELEMAN ET AL., *ESTATE PLANNING FOR THE HEALTHY WEALTHY FAMILY* (2003) (collectively addressing these issues).

61. See HUNT & HUNT, *supra* note 6, at 125-27.

death.

In addition to the foregoing possible disharmonious family harmony consequences, an outright gift to a child or grandchild often exposes the gift to entities or individuals having valid legal claims against the donee and, depending on applicable state law treatment of inherited property, possibly their spouses in a marital dissolution or forced inheritance proceeding. Also, the gifted amount is included in the donee's estate for federal and state transfer tax purposes, and unless it is invested in an exempt resource, it normally will have to be expended before a donee can qualify for Medicaid or Supplemental Security Income benefits.⁶²

Most of the foregoing adverse family harmony, tax, and asset exposure effects of outright gifts can be avoided by a parent creating a trust for the benefit of gift recipients. If the donor's estate is large enough to implicate federal estate taxes, each family-member beneficiary of the trust, including the donor's descendants and possibly their spouses, may be given a so-called "Crummey power," which creates a withdrawal right for trust beneficiaries so that such gifts are of a "present interest" qualifying for the federal annual gift tax exclusion.⁶³ Carefully crafted "spendthrift" trust provisions normally protect the trust estate from claims by most third parties,⁶⁴ even if the trust assets

62. See 42 U.S.C.A. 1396a(a)(10)(C)(i) (Westlaw current through Mar. 21, 2007) (discussing state plan requirements and guidelines); see also 42 U.S.C.A. 1382b(a) (Westlaw current through Mar. 21, 2007) (discussing limited resources excluded from resources considered in qualifying for Supplemental Security Income benefits).

63. I.R.C. § 2503(b)(1) (2006); see generally *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968). See also, *Estate of Maria Cristofani v. Comm'r*, 97 T.C. No. 5 (1991).

64. For a spendthrift provision created by a settlor for a beneficiary, other than the settlor, to be legally effective under common law, it normally must prohibit both the beneficiary from voluntarily assigning the beneficiary's beneficial interest in the trust and a creditor from involuntarily attaching such interest. See RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b (2003); see also RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959). The RESTATEMENT contains certain exceptions related to court orders of spousal and child support, judgment creditors who have provided services for the protection of the beneficiary's interest in the trust, certain governmental claims and creditors who have provided necessary services or supplies to a beneficiary. See RESTATEMENT (THIRD) OF TRUSTS § 59(a)-(b), cmt. a

were previously subject to a "Crummey power," unless local law treats such lapse to be tantamount to the "Crummey power" holder having created a self-settled trust with the lapsed amount.⁶⁵ The spendthrift provisions also can maximize governmental benefits like Medicaid,⁶⁶ protect assets against mismanagement and shift taxable income to beneficiaries by "sprinkle clauses" authorizing trust distributions to be made among family members,⁶⁷ unless the trust is structured to be a "grantor trust," the income of which remains taxable to the

(2003); RESTATEMENT (SECOND) OF TRUSTS § 157(a)-(c) (1959). Many state statutes also include exceptions for support claims. The Uniform Trust Code incorporates all of the foregoing exceptions other than claims for necessary services and supplies. UNIF. TRUST CODE § 503(b), 7 U.L.A. 534-35 (2000). Not all states enacting the Uniform Trust Code have incorporated these exceptions. The effect of an unenforceable spendthrift clause is that no distributions may be made under the distribution standard of the trust to a beneficiary against whom the creditor has a valid claim without first distributing to the creditor to the extent the claim remains unsatisfied.

65. In most jurisdictions, the assets of a "self-settled" trust, in which the settlor is a beneficiary of a trust funded by the settlor, will remain subject to the claims of the settlor's creditors to the full extent of the trustee's authority to make distributions to the settlor. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 58 (2003); RESTATEMENT (SECOND) OF TRUSTS § 330 (1959); *see also* UNIF. TRUST CODE § 505, 7 U.L.A. 534-35 (2000). Prior to the Uniform Trust Code, there was little law on the issue of whether a "Crummey power" that lapsed by virtue of the trust beneficiary's failure to exercise the power within the prescribed time period was tantamount to the settlor having withdrawn from the trust and re-contributed to the trust the amount over which the power lapsed. If so, the amount previously subject to the power would be treated as a "self-settled" amount subject to the settlor's creditors. The Uniform Trust Code specifically provides that such lapsed amount under a "Crummey power" will not be treated as a self-settled trust amount to the extent it does not exceed either the annual gift tax exclusion amount, or the lapse did not result in a taxable gift due to being excess of certain excepted amounts under the provisions of the Internal Revenue Code, basically in excess of the greater of \$5000 or five percent of the trust estate over which such power was exercisable. *See* UNIF. TRUST CODE § 505(b)(2), 7 U.L.A. 534-35 (2000).

66. The assets of trusts created by a third party which provide for discretionary distributions to a trust beneficiary will normally not be considered a resource to such beneficiary for Medicaid or SSI purposes if it is specifically provided that the trustee distribution standard is either totally discretionary (precluding a beneficiary from compelling a trust distribution) or settlor's evinced intent is that trust distributions are intended to be supplemental to governmental resource benefits otherwise payable to such beneficiary. 42 U.S.C. § 1396p(2)(A). *See also* *Myers v. Kan. Dep't of Soc. and Rehab. Servs.*, 866 P.2d 1052, 1059 (Kan. 1994); *Hacker v. Stark County Soc. Servs. Bd.*, 527 N.W.2d 226 (N.D. 1994); *Matter of Leona Carlisle Trust*, 498 N.W.2d 260 (Minn. App. 1993).

67. *See* Treas. Reg. §§ 1.661-1.662 (2006).

grantor.⁶⁸ They also can exclude the trust estate from inclusion in the taxable estate at the death of a trust beneficiary.⁶⁹

Unlike substantial outright gifts that give unfettered control to children and grandchildren, assets gifted in trust can be more judiciously and conservatively distributed to beneficiaries according to well-crafted dispositive provisions. Trust provisions also can preserve the normally-desired equality of disposition between or among children and their descendants as a family unit by providing for the creation of equal trust shares following the death of a parent or surviving parent among children, irrespective of the disparate number of family members within each family unit who were eligible for annual exclusions due to "Crummey powers." After a parent's death,

68. See Treas. Reg. §§ 1.671-1.679 (2006).

69. Provided the trust estate does not consist of a life insurance policy on the beneficiary's life causing the beneficiary to have an incident of ownership in such policy under section 2042 of the Internal Revenue Code, the beneficiary may serve as trustee of the trust and be authorized to make distributions to the beneficiary for "ascertainable standard" needs relating to the beneficiary's health, education, maintenance, and support without such authority causing the trust estate to be includible in the beneficiary's taxable estate as a general power of appointment under section 2041. See I.R.C. §§ 2041(b)(1)(A), 2042 (2006). Other than a so-called "QTIP" marital deduction trust. Sections 2041 and 2042 are the only estate tax provisions implicated in the inclusion of trust assets in the estate of a beneficiary who did not contribute any assets to the trust. However, the trust provisions may want to provide for such inclusion (e.g., by giving the deceased beneficiary a testamentary general power of appointment in favor of the creditors of the beneficiary's estate) if the failure to do so would result in a "taxable termination" for generation-skipping tax purposes. By definition, the generation-skipping tax under section 2601 of the Internal Revenue Code does not apply upon a "taxable termination" of a trust, or the remainder beneficiaries are all "skip persons," to the extent the trust property upon such termination is includible in the taxable estate of a beneficiary who is not a "skip person." See I.R.C. § 2601 (2006). Thus, to the extent a generation-skipping trust has an inclusion ratio greater than zero for generation-skipping purposes (i.e., would otherwise be subject to generation-skipping tax upon a "taxable termination"), giving the trust beneficiary who is not a "skip person," and upon whose death the trust is to terminate and pass to "skip persons," a general power of appointment under section 2041 of the Internal Revenue Code, thereby causing the inclusion of the trust assets in the beneficiary's taxable estate upon such beneficiary's death, no generation-skipping tax will be imposed upon the termination of the trust. See I.R.C. § 2041 (2006). The beneficiary's estate then can make full use of the beneficiary's remaining unified credit to offset any estate tax caused by such inclusion, and if such power is exercised by a married beneficiary, the marital estate tax deduction as well to the extent the trust property over which such power was exercised thereby passes to the beneficiary's spouse in a manner eligible for the marital estate tax deduction.

such trust shares can continue to be held in trust to maintain tax and asset protection benefits. Each child over a prescribed age could be permitted to serve as trustee of such child's separate trust share if there is no parental goal in protecting the child from his or her own imprudent asset management beyond that age.

To guard against "trust baby" syndrome for young adult beneficiaries and maximize the amount of trust-protected assets, trust provisions can require the trustee to consider all outside resources available to beneficiaries prior to making distributions for their health, education, support, and maintenance needs. Outside resources can be specifically defined to include income of any nature, tangible and intangible property not utilized for support and maintenance purposes, the support obligation of a parent or spouse of the beneficiary, governmental resources and insurance, and the beneficiary's ability to engage in gainful employment when not attending an educational institution full-time or not caring for minor children in the home.

To the same end, discretionary distributions for maintenance and support needs, but not for health and education purposes, until the beneficiary reaches a certain age (e.g., age 30), can be required to be conservatively construed. Until such age is attained, the trust provisions can limit distributions for maintenance and support to "the barest necessities of life." In order to clearly demonstrate the intent of the settlor, the trust provisions should delineate that the purpose of such provisions is not to penalize a beneficiary, but rather to prevent the availability of trust assets from stifling the beneficiary's personal ambition, self-reliance, and financial independence.

Excepting the potential disharmony between a parent donor and the gift recipient, the foregoing detrimental aspects of lifetime gifts are equally applicable to outright bequests to family members following the death of a parent under the provisions of a testamentary instrument. As with lifetime gifts, leaving such bequests in a properly structured testamentary

trust can obviate these undesirable consequences.

LOANS TO CHILDREN

Parental loans to a child also can contribute to family disharmony. The first likely occasion is a breach of the loan agreement by a child. Such loans frequently are not repaid as agreed upon or repaid in full. This may be due to a child's financial inability to repay the loan or, as is probably more frequently the case, a child's viewpoint that a repayment obligation under a parental loan is less important than under a commercial loan. However, parents can become disgruntled quickly with a child who they perceive to have an insufficient basis for non-payment.

Following a parent's death, the issue of parental loans to children can become even more problematic. Because of family harmony problems that are similar to those which can result from gifts to children, the testamentary instrument should address whether parental loans to children are either to be forgiven or taken into consideration when determining the child's share of the estate. Attorneys should ensure that the testamentary instrument addresses the dispositive effect of all parental loans to descendants that are outstanding at the client's death, irrespective of whether any outstanding loans exist at the testamentary instrument's execution. Otherwise, not only will the client incur additional legal costs should a subsequent parental loan require an amendment to the testamentary instrument, but frequently the client will fail to make an appropriate amendment to their estate plan.

Verbal loans are subject to significant factual difficulties, and thus they tend to result in family disharmony and attendant costs. Following a parent's death, the verbal promissor often will contend that the transaction was a gift, not a loan. Even if the parent plans to clearly document both the amount of the loan and payment schedule in the parent's records, there is no assurance that will be the case or the records will be complete. Thus, there usually will be factual issues regarding whether the

transaction was a loan versus a gift, the loan amount, payment schedule, payments made or whether any interest was payable on the outstanding balance. Verbal loans also are more likely than written obligations to become legally unenforceable during the parent's lifetime because they have a shorter statute of limitations.⁷⁰

If the statute of limitations has run on an unpaid loan to a beneficiary of the estate or trust, it will not be legally enforceable. Thus, as it will not constitute an asset of value in the estate or trust, theoretically the loan should not be considered in determining the promissory-beneficiary's share of the total value of the estate or trust.⁷¹ However, a majority of courts hold that a debt for which the statute of limitations has expired should be viewed as an asset already in the hands of the promisor and thus treated as an advancement against the beneficiary's share of the estate or trust.⁷²

Due to the foregoing possible formidable factual and family harmony problems which can surround verbal loans, as a general rule, the testamentary instrument should forgive any verbal loans made by the testator or settlor to beneficiaries and provide that any such loans outstanding at the parent's death should not be considered in determining the beneficiary's dispositive share. Thus, whether a particular transaction between a parent and sibling was a gift or a loan should be of no family harmony or dispositive consequence absent a specific provision in the testamentary instrument addressing the transaction's effect under its dispositive provisions.

If there are any outstanding verbal loans at execution of the testamentary instrument that the parent wants to be considered

70. See 51 AM. JUR. 2D *Limitation* § 135 (2002) (providing that "[i]n some jurisdictions, there are separate statutes of limitation for written and unwritten contracts, and the statute for written contracts is longer.").

71. See, e.g., *Allen v. Edwards*, 136 Mass. 138, 140-42 (1883); *Milne's Appeal*, 99 Pa. 483, 491 (1882). For example, Kansas has a three year statute of limitations on verbal obligations and five year statute of limitations on written obligations. Kan. Stat. Ann. §§ 60-511, 60-512 (2006).

72. See, e.g., *In re Estate of Wernet*, 596 P.2d 137, 146-47 (Kan. 1979).

in determining a child's estate or trust share, the loans should be reduced to promissory notes that name the parent or trustee of the parent's revocable trust as promisee. Upon parental request, children should be willing to execute a promissory note evidencing an outstanding verbal loan. In the absence thereof, the terms and current balance on such loan can be specifically referenced in the testamentary instrument, any remaining balance at date of death that is forgiven,⁷³ and the amount of such forgiven debt specifically treated as an advancement against the child's share of the estate or trust.

Unlike verbal loans, written loans do not present such daunting factual issues. Thus, the provisions of the testamentary instrument normally should provide that a loan to a beneficiary evidenced by a written instrument should be considered an asset of the estate or trust in determining the beneficiary's share of the estate or trust at its full unpaid balance, that the loan is not subject to any valuation reduction due to being unsecured or having a below market interest rate, and that any remaining balance on the loan at the time of the parent's death is to be allocated to such beneficiary in satisfying the promisor child's share of the estate or trust.

The testamentary instrument should further state that these consequences will ensue even if the note is legally unenforceable at the time of such allocation, such as if the statute of limitations had expired on its collection, and that any beneficiary's allegation that the note has been forgiven or cancelled are to be

73. Such forgiveness should have no adverse income tax consequence to the promisor. Although forgiveness of indebtedness ordinarily results in income recognition to the promisor, the forgiveness of debt under a will or revocable trust in a family context constitutes a gift. *See* I.R.C. § 61(a)(12) (2006). An exception from income exists with regard to "the value of property acquired by gift, bequest, devise, or inheritance." I.R.C. § 102 (2006). Thus, the forgiveness of a debt owed by a natural object of the promisee's bounty under the provisions of a testamentary instrument should not have any adverse income consequences, and for income tax purposes, the forgiveness will be treated in the same manner as its substantive consequences, or in the same manner as it would have been otherwise treated for income tax purposes in the absence of section 102, had the underlying obligation been paid in full by the promisor and the promisee had gifted such payment back to the promisor.

disregarded, unless evidenced by a writing executed by the donor. To ensure the plan's integrity, counsel should instruct the client to have a child execute a promissory note regarding any future loans to such child that the client intends to be similarly considered.

CHILD'S CLAIM FOR SERVICES OR CARE PROVIDED TO A PARENT

Family harmony is even more vulnerable when a child makes a claim against a deceased parent's estate or trust for compensation for services or care rendered to a parent in a non-fiduciary capacity.⁷⁴ In many such situations, a child spends considerable time caring for a parent and often resides with the parent for an extended period. Following a parent's death, this claim may manifest itself in several ways. The child may assert that he or she is legally entitled to be compensated for care from the parent's assets under an express or implied contract theory,⁷⁵ or that the parent promised to compensate the child in the estate plan by including a specific bequest in the testamentary instrument.⁷⁶ Such assertions are difficult to rebut when the parent is deceased.

A parent can reduce the viability of these assertions by making his or her intent evident. A parent who intends for a child to be compensated for care, and who is not making regular payments for such care, should enter a written compensation agreement with the child that embodies the terms of such understanding to avoid any misunderstanding following the parent's disability or death. In the converse situation where no compensation is intended, a parent could reduce such understanding to a written instrument executed by the parent and child. However, this approach normally is undesirable. It

74. Services provided in a fiduciary capacity would normally be compensable under governing law and the compensable nature of such services would normally be addressed under the provisions of the governing instrument.

75. See, e.g., *In re Estate of Beecham*, 378 N.W.2d 800, 801 (Minn. 1985); *Gibson v. McCraw*, 332 S.E.2d 269, 271 (W. Va. 1985).

76. See 34 C.J.S., *Executors and Administrators* § 401 (1998).

creates unnecessary tension between the parent and caregiver child, and it makes a parent appear unappreciative of the child's efforts and distrustful of the child's motives. In short, the potential disharmony among children following the parent's death is replaced by certain disharmony between the parent and child during the parent's lifetime.

The more desirable strategy for discouraging a child's claim for services is under the provisions of the parent's testamentary instrument. A testamentary provision could provide that: in the absence of a written agreement executed by the parent providing for payment for care, services, or past practice during the parent's lifetime, it is the parent's assumption that any such care or services provided by a beneficiary in a non-fiduciary capacity were provided strictly out of love and affection, not in anticipation of any economic benefit.

To create a chilling effect on a possible claim against the estate or trust, the testamentary instrument can further provide that: if any beneficiary makes a claim against the estate for any such care or services in contravention of the parent's intent, any amount ultimately paid or judicially allowed for such claim would be considered an advancement against the beneficiary's share of the estate or trust. Such provisions should result in a "dollar-for-dollar" reduction of the beneficiary's share to the extent of any such claim allowance or settlement. Moreover, the prevailing beneficiary would have enjoyed only a Pyrrhic victory in sustaining his or her claim, having incurred an overall net loss after considering any legal fees expended in its pursuit and income taxation incurred on its payment.⁷⁷

While some parents understandably may want to protect the estate or trust estate from an involuntary claim for non-fiduciary care or services provided by a child, other parents will be desirous of providing for a specific bequest in appreciation

77. Although the claim proceeds ostensibly are in the nature of compensation, the claimant would appear to have a viable argument that the allowance of such claim should not convert into taxable income; the same non-taxable amount the claimant would otherwise have received in the absence of such claim.

thereof. In such latter circumstance, the parent should state in the testamentary instrument that the reason for such bequest was in appreciation for such child's services and that such decision was the parent's alone and not the result of any contractual obligation or influence from any other person. Otherwise, a caregiver child is more likely to be erroneously blamed by a sibling for unduly influencing a parent to make such bequest.⁷⁸ Moreover, specifying that the decision was the parent's alone and not the result of any contractual agreement should help rebut any assertion by the Internal Revenue Service that there was an agreement between the parent and child that the bequest was to be in lieu of paying taxable compensation to the child during the parent's lifetime.⁷⁹

In summary, if the testamentary instrument does not properly address this issue, considerable litigation expense and a skewing of the intended estate plan may result from claims by a caregiver child. Additionally, an enduring acrimony is

78. See *In re Estate of Allendar*, 833 N.E.2d 529, 533 (Ind. Ct. App. 2005) (stating that "[c]ertain legal and domestic relationships raise a presumption of trust and confidence as to the subordinate party on the one side and a corresponding influence as to the dominant party on the other. These relationships include that of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child, and there may be others In such cases, if the plaintiff's evidence establishes (a) the existence of such a relationship, and (b) that the questioned transaction between those parties resulted in an advantage to the dominant person in whom trust and confidence was reposed by the subordinate, the law imposes a presumption that the transaction was the result of undue influence exerted by the dominant party, constructively fraudulent, and thus void. . . . At that point, the burden of proof shifts to the dominant party who must demonstrate by clear and unequivocal proof that the questioned transaction was made at arm's length and thus valid."); see also *Williams v. Robinson*, 36 A.2d 547, 549 (Md. 1944). Influence which the law condemns as "undue" is "not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of property." 79 AM. JUR. 2D *Wills* § 374 (2002). It is undue only if it coerces a person into doing that which his best judgment tells him not to do. *Id.* Influence of children over parents is legitimate as long as it does not extend to a "positive dictation and control over the mind" of the parent. *Id.* at § 375. It normally requires that the child occupied a confidential relationship with the parent, such as under a power of attorney, or cared for the parent or helped manage the parent's finances, particularly if the parent was of advanced age and in poor health. *Id.*; see also *id.* at §§ 383-84.

79. See *Cotnam v. Comm'r*, 263 F.2d 119 (5th Cir. 1959), *overruled on other grounds by* *C.I.R. v. Banks*, 543 U.S. 426, 125 S.Ct. 826 (2005).

otherwise likely to occur between the caregiver child and such child's siblings who are prone to conclude such claim was motivated more by greed than any underlying merit.

INTENDED DISPARITY IN CHILDREN'S SHARES

Although no state law confers upon children the right to inherit parental property,⁸⁰ nonetheless children often feel they have such inherent right, legal or otherwise, or at least a legal or equitable entitlement to a share of a parent's estate or trust equal to that of their siblings. This view is based in large part on the children's perspective that the share they receive is the final measure or "report card" of their parents' love and approval. Thus, parents conferring unequal financial benefits between or among children under their estate plans should consider the potential impact upon family harmony created by such disparate treatment.

It normally is desirable for a parent providing for unequal distributions between or among children to specifically delineate, either in the testamentary instrument or in an outside written statement, the reasoning therefore and that such decision was the parent's alone. These reasons for disparate treatment can include rewarding a child for providing care or for participating in the parent's business, providing for a child in greater financial need due to a disability or other circumstances, or simply due to the parent having concluded that a child does not personally merit the same dispositive treatment as other children.⁸¹ This statement should go far in dissuading a child

80. HOOPS, *supra* note 52, at 22-23.

81. The parent should be somewhat general in the testamentary instrument as to any negative reasons for unequal treatment. Specific and inflammatory negative statements about the child's character may serve to incite a challenge to the legality of the testamentary instrument and create an independent cause of action for libel against the parent's estate. Any provable damages resulting therefrom are likely to be greater if the libelous statement is contained in a will, which is a matter of public record, rather than under the provisions of a revocable trust. A trust's provisions are not required to be filed as part of public record or furnished to third parties in its entirety and are disseminated only among the family members who are its beneficiaries.

receiving a lesser share from concluding that such treatment resulted from the influence of a favored child. Stating these reasons also avoids the angst of children having to speculate on the parental rationale or coming to the wrong conclusion for such disparate treatment, e.g., that their parents had less affection for them as opposed to a parental desire to reward a sibling for care or services provided to them either personally or in a business endeavor. However, irrespective of the merits for any separate treatment from an objective perspective, stating the reasons therefore may not be accepted by children who are economically disfavored as a result. For example, if a parent states that a particular child is receiving more because he or she has a greater financial need, other children are likely to feel they are being penalized for being ambitious, successful, or having married an affluent spouse, except possibly in situations where such need is related to a disability.

There obviously are situations where disparate treatment is related to a child's failure of ambition, unacceptable character or lifestyle, or having a distant or estranged relationship with the parent. Admittedly, there is something to be said for not giving an "undeserving" child a benefit equal to that of other children. Nonetheless, such unequal treatment is not without potential adverse family harmony consequences. Although there may be little family harmony left to preserve between the disaffected child and preferred siblings in a high percentage of such situations, this is not always the case. There is a high risk that even with the aforementioned parental statement in the testamentary instrument or in a separate writing that the parent's decision in this regard was not influenced by any other person, a disaffected child is likely to be highly jealous of siblings receiving greater bequests and may nonetheless blame such preferred siblings for the child being in a disfavored status.

Moreover, a parent should at least consider that no positive benefit is likely to result thereby. A change in the child's behavior seldom results from disaffected treatment in the estate plan. Such treatment also will be the last memory the child has of the parent, which if not resulting in an enduring

resentment not previously present, will create a permanent feeling of rejection that could exact a costly emotional toll on the child.

If the only reason for reducing a child's share is the parent's belief that the child would imprudently manage his or her bequest, there is an obvious, but nonetheless much underutilized, alternative to reducing the child's share or disinheritance. A parent could make a bequest in trust for the benefit of the child to ensure that the money will be spent in a prescribed manner and for the purposes desired by the parent.⁸² The trust may even include provisions designed to encourage desired changes in the child's behavior. Examples include "matching provisions" for earned income or granting a bequest upon attaining a college degree.⁸³

Should a parent nonetheless decide to disinherit, provide for a child to receive a reduced share of the estate or trust, or provide that a child's share, unlike shares of siblings, is to be left in a spendthrift trust with a third party trustee, the parent should consider immunizing the estate or trust against the costs and potential legal liability from an unwarranted challenge by the disaffected child.⁸⁴ There are four principal strategies for immunizing the estate or trust. First, the testamentary instrument should comply with all legal formalities, so that any questions that might arise as to the parent's testamentary capacity are resolved in the parent's favor by proper documentation and credible witnesses, such as the parent's personal physician.⁸⁵

Second, if a parent completely disinherits a child, such

82. See *In re Estate of O'Brien*, 649 N.Y.S.2d 220, 222 (App. Div. 1996).

83. Under the legal concept of freedom of testamentary disposition, courts normally allow conditions on dispositions as long as they serve a positive purpose and do not cause irreparable damage to a living person. See generally Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1037 (1994) (discussing freedom of testation).

84. See HOOPS, *supra* note 52, at 23.

85. EDMUND T. FLEMING, *ESTATE PLANNING AND ADMINISTRATION: HOW TO MAXIMIZE ASSETS, MINIMIZE TAXES, AND PROTECT LOVED ONES* 35 (2001).

intent should be stated in the testamentary instrument.⁸⁶ A clear and unambiguous statement in this regard should satisfactorily rebut any claim by a disinherited child that the omission to provide for the child under the provisions of the testamentary instrument was the result of a mistake or inadvertence.⁸⁷

Third, when a parent is giving a child a lesser amount than other children or in a less favored manner such as in a spendthrift trust, the parent should state before legal counsel and at least one witness, as well as in a separate writing or in the provisions of the testamentary instrument, the reasons therefore and that the decision was not influenced by any other person.⁸⁸ This statement should discourage a disaffected child from bringing a claim based on "undue influence" by the more favored child or children and reduce the legal efficacy of any such claim.⁸⁹

Finally, the parent may include an *in terrorem* or "no contest" provision in the testamentary instrument.⁹⁰ This provision provides that any legal challenge by a child regarding his or her share of the estate, or any other provision of the testamentary instrument, would result in a total loss of his or her share. Normally, this result is obtained by providing that a child in such circumstance is deemed to have predeceased the parent. The provision will only tend to dissuade the child from making

86. HOOPS, *supra* note 52, at 22-24.

87. This reference is not just for the purpose of avoiding any ambiguity as to the parent's intent. In so-called "pretermitted child" states, statutes provide that the failure to name or refer to a child in the will who is not a devisee or legatee entitles the child to take the share the child would have received had the parent died intestate. 80 AM. JUR. 2D *Wills* § 1536 (2002). The common law rule is that any omission of a child from a will was presumed to be deliberate. *Id.* at §§ 1536-37. Such statutes originally were enacted for the protection only of children born after execution of the will. *Id.* at § 1539. However, in some jurisdictions, children living at the time of execution of the will are within the purview of the statute. *Id.*

88. See HOOPS, *supra* note 52, at 22-24 (discussing how specific language should be used in testamentary document explaining reasons for disinheritance).

89. *Executors and Administrators*, *supra* note 76, at § 401. See also, HOOPS, *supra* note 52, at 22-24. The attorney also should interview the client thoroughly on this issue and prepare a separate document attesting to the facts elicited in the interview process signed by the attorney and other witnesses to the interview.

90. See *id.* at 58-59.

a legal challenge if the provision is enforceable under applicable state law, and if the bequest is large enough that the child would not risk forfeiture in pursuit of the claim.⁹¹

If an *in terrorem* provision is included in the testamentary instrument, it should be narrowly drafted so that it is no broader than necessary to achieve the client's objectives. For example, if the goal is to create a substantial disincentive for a child to contest his or her share, it should not extend to seeking a judicial resolution of ambiguities or to challenging a fiduciary's administration of the estate or trust, particularly a non-family fiduciary. The attorney also should ask whether the client intends to disinherit only the child or also the child's descendants under the *in terrorem* provision. If the latter is the case, and under the provisions of the testamentary instrument or governing law (for example, an "anti-lapse" statute), the child's descendants would receive the child's interest due to only the child being deemed to have predeceased the parent by virtue of the provision, the provision must provide that the child and the child's descendants in that circumstance are all to be deemed to have predeceased the parent.

UNINTENDED DISPARITY IN CHILDREN'S SHARES

In many situations, disparate treatment of children is an inadvertent consequence of property passing outside the provisions of the testamentary instrument. A parent may not have been advised, or may have simply forgotten, that property held in joint tenancy with a child or which has a beneficiary designation naming a child will pass at the parent's death to such surviving child outside the provisions of the testamentary

91. Such clauses have historically been favored by the courts in furthering public policy objectives of discouraging litigation and upholding the testator's intent. The trend is now in the opposite direction. Now, a majority of states either does not enforce such clauses or enforces them only when the contestant lacks probable cause for initiating a judicial challenge to the testamentary instrument, which is the position of the Uniform Probate Code and the Third Restatement of Property. See Bashaw, *supra* note 4, at 349 (discussing use of *in terrorem* clauses).

instrument. Furthermore, absent a provision in the instrument to the contrary, the passing normally will not reduce the surviving joint tenant's share of the parent's estate or trust.⁹² This circumstance frequently causes the integrity of an estate plan to go awry. Many parents have the misconception that if their will or trust provides for equal shares to pass to their children, such provision will govern the disposition of all of their property interests.⁹³

A child benefiting from ownership succession outside the estate or trust may argue that this was the intended result of the parent. Other children are likely to argue that such disposition was unintended, and that such joint tenancy property or property having a beneficiary designation passing to the child should be considered an asset governed by the testamentary instrument. This is particularly true where the asset is a bank account with a child, and other children believe that such ownership was merely a convenience for the sole purpose of permitting the joint tenant child to sign on the account for the benefit of the parent.⁹⁴ Whichever side of the issue a fiduciary or a court should ultimately choose, family harmony normally will be a consequential casualty.

To avoid this consequence where the testamentary instrument is intended to govern the portions of parental assets passing to descendants, its provisions should state such intent and that any property interests of the parent, including the value of that portion of any joint tenancy property for which the

92. See *infra* notes 56-57 and accompanying text. See also 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 7 (2005).

93. In a 1990's survey of the general public conducted by the Kansas Bar Association, the records of which were subsequently lost, seventy-nine percent of those polled were of the erroneous opinion that the provisions of a decedent's will governed the disposition of all property in which a decedent had an ownership interest.

94. Intent is an element of joint tenancy ownership. See 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 12 (2002). See also 10 AM. JUR. 2D *Banks and Financial Institutions* §§ 677 and 687 (2002) (discussing evidence of intent and circumstances which might permit evidence rebutting such intent where accounts held in co-ownership are to be paid to the surviving co-owner).

parent furnished the consideration, passing outside its provisions at death under joint tenancy or pursuant to a beneficiary designation to a person who is a beneficiary of the estate or trust shall be treated as an advancement against the beneficiary's estate or trust share.

Occasionally, however, a parent specifically intends for certain joint tenancy or beneficiary property to pass outside the provisions of their testamentary instrument to a favored child in order to avoid the other children gaining knowledge of the preference under the provisions of the testamentary instrument. Such anonymity can be preserved by providing for advancement treatment only for joint tenancies created or beneficiary designations made on certain types of property interests or, assuming the preferential property interest of the parent is the only property currently owned as a joint tenant with a child or which names a child as a beneficiary, joint tenancies created or beneficiary designations made after the execution of the testamentary instrument.

ARBITRATION AND MEDIATION PROVISIONS

Including testamentary provisions requiring mediation and/or arbitration to resolve family disputes following death also can serve as a family-harmony-enhancing strategy. Mediation and arbitration are less contentious and less adversarial than litigation, and they occur out of the public eye.⁹⁵ Consequently, as opposed to a judicial resolution, resolving family disagreements and disputes regarding estate or trust administration through mediation or arbitration is less likely to create irreparable family divisions.

Mediation and arbitration provisions are common in business agreements, but are quite rare in wills and trusts. Although George Washington included a binding arbitration

95. See JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* 3-4 (3d ed. 2005) (discussing benefits of dispute resolution methods, including privacy and preservation of relationships).

provision in his will,⁹⁶ his precedent has failed to gather any gravitas in the more than two centuries since his death.

This scarcity probably results mostly from the general lack of focus on family harmony issues by estate planning attorneys. However, it is at least in part due to the legal hurdle that mediation and arbitration must normally by agreement of the parties.⁹⁷ Thus, it is highly dubious whether a provision requiring mediation or arbitration in a testamentary instrument would be legally enforceable absent a “stick” in the testamentary instrument which would serve to compel such agreement.⁹⁸

96. George Washington's will provided “that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as binding on the Parties as if it had been given in the Supreme Court of the United States.” Will of George Washington, Transcription, <http://gwpapers.virginia.edu/documents/will/text.html> (last visited Mar. 16, 2007). Fortunately, there was no post-death circumstance that caused the legal efficacy of this provision to be tested. See Arnold M. Zack, *Arbitration: Step-Child of Wills and Estates*, 11 ARB. 179, 182 (1956).

97. See Dominic J. Campisi, , *Fiduciary Liability Trends Representing Estate and Trust Beneficiaries and Fiduciaries*, § 7, ALI-ABA COURSE OF STUDY MATERIALS MANDATORY ARBITRATION IN PROBATE AND TRUST DISPUTES (2006).

98. Thirty-five states and the District of Columbia have adopted the Uniform Arbitration Act. UNIF. ARBITRATION ACT, 7 U.L.A. 2 prefatory cmt. (2000). The Federal Arbitration Act governs arbitration in maritime transactions and matters involving interstate commerce. 9 U.S.C.A. § 2 (Westlaw current through Mar. 21, 2007). As one would expect, both Acts require the unanimous agreement of the parties to the arbitration. The Arizona Court of Appeals denied enforcement of an arbitration clause in an *inter vivos* trust. *Schoeneberger v. Oelze*, 96 P.3d 1078, 1081-84 (Ariz. Ct. App. 2004). The court held that a trust agreement is not a contract and thus statutory provisions addressing the enforcement of arbitration provisions in contracts had no application to a claim of a beneficiary against a trustee. *Id.* at 1082. The beneficiaries cited the Restatement for the proposition that the trustee is subjected to powers created by the trustee. *Id.* (citing RESTATEMENT (SECOND) TRUSTS § 37 (1959)). The court held that a settlor's right to reserve powers over trust administration is not absolute and may not deny beneficiaries their right of access to courts in resolving disputes. *Id.* at 1083-84. The court concluded that “[a]lthough it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate.” *Id.* at 1084 (quoting S. Cal. Edison Co. v. Peabody W. Coal Co., 977 P.2d 769, 771 (1999)). The beneficiaries did not argue that section 27 of the Restatement, requiring that the trust be administered solely in the best interests of the beneficiaries, supported their position. See RESTATEMENT (SECOND) TRUSTS § 27 (1959).

That "stick" could be a requirement that beneficiaries execute a written consent to the mediation and arbitration provisions of the testamentary instrument as a condition precedent to receiving any benefits under the testamentary instrument or serving as financial fiduciary. Alternatively, the instrument could authorize a "special trustee" or "trust protector" to amend the trust provisions to reduce significantly a non-consenting beneficiary's share of the estate or trust.⁹⁹ Such provisions should be legally enforceable because no beneficiary of an estate or trust, other than a spouse, has a legal right to a share of the estate or trust under any state law. Mediation and arbitration also further the desirable public policy goals of alternative dispute resolution and preservation of family harmony, so such provisions should be legally enforceable.

In situations where mediation and arbitration are desired to resolve disputes involving family members, whether between children as beneficiaries or between a beneficiary child and a child serving as financial fiduciary, testamentary provisions could first require mediation. Mediation in resolving family law disputes (e.g., divorce, child custody disputes, etc.) has been quite common for an extended period of time.¹⁰⁰ The reason it has been proven popular in resolving such disputes is that it addresses issues of family dynamics that otherwise often prevent resolution in a litigation context. For example, it permits the parties to address emotional issues.¹⁰¹ It also provides a venue for the parties to listen to each other's concerns and reach an agreement appropriate for their particular situation.¹⁰² Studies have indicated that parties who have mediated disputes are likely to have a higher satisfaction level

99. See *In re Will of Rubin* 540 N.Y.S.2d 944, 946 (Surrogate Ct. 1989) (discussing how "special trustees" can restrict powers of executors); see also *Estate of Maria Cristofani v. Comm'r*, 97 T.C. No. 5 (1991); Elizabeth C. Minnigh, *Utilizing Trust Protectors in Domestic Estate Planning*, 48 TAX MGMT. MEMO 3 (Jan. 8, 2007).

100. JAY FOLBERG & ALLISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 1-7 (1984).

101. *Id.* at 161.

102. JAY FOLBERG, *MEDIATION: THE NEW FORCE IN FAMILY LAW* 74, 75 (Section of Family Law, A.B.A. ed., 1984).

than those who litigate or negotiate their disputes.¹⁰³ Due to similar family dynamics involved in disputes involving probate and post-death revocable trust administration matters, there is no reason that mediation will not prove equally advantageous over litigation and negotiation in resolving such matters.¹⁰⁴ In the event mediation failed to resolve disputes among family members, binding arbitration would then be required under the testamentary instrument to resolve such disputes.

Mediation would be specified to be under the Commercial Mediation Rules of the American Arbitration Association (AAA) or other rules deemed acceptable by the parties. Should it prove unsuccessful in resolving a family dispute, unless all family members involved in the dispute desire otherwise, testamentary provisions would then require binding arbitration under AAA rules.¹⁰⁵ By providing that AAA rules apply, rather than the AAA actually governing the arbitration, costs and fees may be reduced. The provision also can list requirements for the arbitrator.¹⁰⁶ For example, beyond the ten years of experience in trusts and estates currently required for arbitrators of trusts and estates disputes under AAA rules,¹⁰⁷ provisions can require the arbitrator to belong to the American College of Trust and Estate Counsel, whose members are elected by their peers based on experience and competency in trusts and estates law.

The arbitration provisions of the testamentary instrument also could provide that the arbitrator would be appointed by a special trustee or trust protector to ensure further competency, the special trustee also being empowered to resolve any

103. See, e.g., ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE CHILD CUSTODY, AND MEDIATION 184-93 (1994); GWYNN DAVIS & MARIAN ROBERTS, ACCESS TO AGREEMENT: A CONSUMER STUDY OF MEDIATION IN FAMILY DISPUTES (1988).

104. Gary, *supra* note 13, at 397.

105. See AM. ARB. ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES - A PRACTICAL GUIDE 2007, <http://www.adr.org/index.asp> (search "Drafting Dispute Resolution Clauses"; then register as guest (last visited Mar. 16, 2007) (listing AAA rules).

106. See *id.*

107. *Id.*

differences between or among the parties which might arise in the interpretation of the AAA rules of arbitration. Although the provisions can require the appointment of multiple arbitrators to enhance the prospect of a well-reasoned decision, there must be an odd number to avoid a deadlock, and multiple arbitrators result in substantially increased costs.

Binding arbitration has other benefits over a judicial resolution in addition to privacy and a greater likelihood of preserving family harmony. Binding arbitration normally costs less and achieves a significantly faster resolution. The downside is that an arbitrator's decision generally is a binding and final resolution of the issue and thus not subject to further appeal. Although mediation and arbitration provisions in testamentary instruments certainly are not desirable in every instance, they are worthy of much greater consideration than they currently receive from estate planning attorneys.

CONTRACTUAL VERSUS NON-CONTRACTUAL NATURE OF TESTAMENTARY INSTRUMENT

Wills and trusts executed by married persons are either contractual or non-contractual in nature. If contractual, there will be legal restrictions placed on the ability of one spouse to amend or otherwise modify the provisions of the instrument after the death of the other spouse. Sometimes, the testamentary instrument also restricts the unilateral amendment or revocation of the plan by one party during the lifetime of the other party, without notification to or consent of the other party. If such testamentary instruments are non-contractual in nature, both spouses have complete discretion in amending their estate plans.

Courts normally require a provision providing for an identical disposition following the survivor's death as a prerequisite to concluding that the spouses intended a joint instrument or separate testamentary instruments to be of a

contractual nature.¹⁰⁸ In a joint-and-mutual will setting, a court reviews the use of plural pronouns, “joint-and-mutual” language, joinder and consent language, and a disposition of the entire estate to the surviving spouse, and equal distribution to the families of both spouses after the surviving spouse’s death to determine if there was a contractual intent in the absence of actual contractual language.¹⁰⁹ Moreover, even in the absence of any contractual language, courts generally allow parol evidence to establish that the instruments were intended to be contractual in nature when a husband and wife execute separate testamentary instruments providing for similar dispositions upon the surviving spouse’s death.¹¹⁰

The requirement of similar dispositive schemes upon the surviving spouse’s death is common in the estate plans of most married persons. Thus, married couples who do not intend testamentary instruments with similar dispositive schemes to be contractual should not leave open the possibility that a disaffected child, whose interest was reduced or restricted by the surviving spouse’s amendment to the estate plan, could viably assert that such amendment constituted a breach of a contractual agreement between the spouses. Beyond the disharmonious family circumstances created by this argument, such challenges normally will damage the relationship between a disaffected child and siblings and exact a costly toll on the estate’s value ultimately passing to beneficiaries.

Consequently, every testamentary instrument of married persons should clearly state whether it is subject to any contract with another person. If it is non-contractual, the instrument should succinctly so state and additionally make clear that it is subject to modification at any time without the consent of any

108. 79 AM. JUR. 2D *Wills* § 714 (2002); see also *In re Estate of Chronister*, 454 P.2d 438, 443 (Kan. 1969).

109. 79 AM. JUR. 2D *Wills* § 661 (2002); see also *Bell v. Brittain*, 880 P.2d 289, 293 (Kan. App. 1994).

110. 79 AM. JUR. 2D *Wills* § 706 (2002); see also *Garrett v. Read*, 102 P.3d 436, 441-42 (Kan. 2004).

other person, even following the death of the other spouse. If contractual, there should be a clear delineation of the exact nature of such contract, including specific restrictions on unilateral amendments to the plan without notice to or consent of the other spouse.

The contractual restrictions in many contractual wills and trusts are too broad in this regard because they unduly restrict flexibility by prohibiting all changes to the testamentary instrument following the first spouse's death, instead of proscribing only those changes that would thwart the parties' intent (for example, prohibiting only changes by the surviving spouse affecting the disposition of the estate which is to pass to the predeceased spouse's children).

RESTRUCTURING THE TESTAMENTARY INSTRUMENT

To properly recognize the emphasis clients typically place on family harmony, the author's firm has revised its will and revocable trust forms to more comprehensively address family harmony issues through the inclusion of the provisions discussed above and give them their rightful prominence at the beginning of the testamentary instrument.

The first article of the testamentary instrument is titled "Family Matters; Provisions Furthering Trust Purposes." Under this article is the traditional "Family Declaration" paragraph outlining members of the family. Following this paragraph is a "Personal Declaration" paragraph summarizing the primary goals of the estate plan from the purview of the client, including, for example, preserving family harmony, minimizing taxation, reducing administrative costs, and protecting assets from claims by third parties through the use of lifetime trusts for family members.

If the client names a third-party financial fiduciary, the provisions of the "Personal Declaration" paragraph normally outline the reasons therefore (for instance, that not as any reflection on the children's ability to manage the estate but to

relieve children of this burden and to minimize any risk to the paramount goal of family harmony that might otherwise be adversely affected).

If the parent nonetheless decides to name a child as financial fiduciary after receiving advice on the risk, this declaration can state the reasons for such selection, including, for example, that such child is closer geographically or has greater financial experience. It also can specify whether the parent wishes that the child or children be reasonably compensated. Also, this paragraph sometimes includes the client's rationale for any unequal treatment among children under the dispositive provisions of the instrument.¹¹¹

Subsequently-titled paragraphs in the first article address family harmony issues that are appropriate to the particular client and otherwise could negatively impact the integrity of the intended estate plan. These paragraphs address property passing outside the provisions of the instrument, gifts and loans to family members, claims for services provided by beneficiaries, *in terrorem* or "no contest" provisions, mandatory mediation or arbitration provisions in resolving family disagreements, and whether the testamentary instrument is contractual or non-contractual in nature. Having these optional provisions in the first article ensures the underlying issues are addressed when appropriate in the testamentary instrument of every client. Also included in this "family article" are provisions naming

111. Normally, state law permits third parties to accept the pages of a revocable trust showing its creation and name (normally on the first page), the trustee appointment and succession provisions, the trustee powers and the execution page as sufficient proof of a trustee's authority when a settlor is transferring title of assets to the trustee and the trustee is conveying titled trust assets. As opposed to providing copies of relevant pages of the trust instrument, the Uniform Trust Code provides that third parties may rely on a "Certification of Trust" authenticated by any trustee, which contains certain relevant information regarding the existence and date of the trust, the identities of the settlor and trustee, the powers of the trustee, the authority of co-trustees to sign, the trust's taxpayer identification number, and the manner of taking title to trust property. UNIF. TRUST CODE § 1013, 7C U.L.A. 663-64 (2000). Thus, for individuals using a revocable trust as the primary testamentary instrument, unless the entire trust instrument is otherwise legally required to be filed of public record or furnished to third parties, privacy regarding "Personal Declaration" provisions should be preserved.

guardians for any minor children and acknowledging any premarital agreement that the dispositive provisions of the instrument are intended to satisfy.

HEALTHCARE ADVANCE DIRECTIVE ISSUES

Although financial fiduciary issues dominate problems associated with the maintenance of family harmony following a parent's disability or death, the often-negative impact of healthcare issues on family harmony where a child or children serves as healthcare fiduciary should not be overlooked.¹¹² Because healthcare fiduciary authority, unlike financial fiduciary authority, is quite personal in nature, even more clients name a mature adult child or children as healthcare agents than as financial fiduciaries. Due to the personal element of healthcare decision-making, the lack of a viable alternatives to appointing children to serve in such capacity, and the severe personal distress likely to be felt by children if a parent appoints a healthcare fiduciary outside the immediate family, parents are understandably unlikely to be dissuaded from such perspective by any family harmony considerations or the economic conflicts of interest posed by a child serving in such capacity.

Although naming more than one child as health care agent has the same family harmony enhancing benefit discussed above with regard to naming more than one child as financial fiduciary, i.e., avoiding children who would otherwise not be so named from feeling disenfranchised, it also will create the same above-discussed additional friction points. Moreover, having multiple health care agents can create undue delays in making often time-sensitive health care decisions unless the instrument permits health care providers to rely on one health care agent to implement the decision of the majority or make a sole determination in the event that such health care agent deems

112. See, e.g., Carla K. Johnson, *Decisions For Aging Parents Reignite Old Sibling Rivalries*, CHARLESTON SUNDAY GAZETTE - MAIL, Jan. 14, 2007, at A7.

consultation with other health care agents is not feasible or practical under the circumstances.

The obvious family harmony conflict, which will tend to resonate among siblings when a child is named as healthcare fiduciary, is whether a child serving as healthcare fiduciary under a healthcare power of attorney is providing satisfactory care for a parent. Although such considerations often are motivated by the best interest of a parent, unfortunately, they also frequently are motivated by either the same sibling rivalry factors present when a child serves as financial fiduciary or the economic self-interest of a child in maximizing the amount of assets available for distribution following the parent's death. Such less than laudable financial interest motivations typically find their expression in a child's criticism either that the level of care authorized by a healthcare fiduciary is excessive or that the amounts expended on such care are unnecessary because the parent is cognitively unable to appreciate such care.

These tensions between children can be substantially lessened, if not totally eliminated, if the parent has sufficient long-term care insurance to provide for such needs, including the costs of home care and assisted living. In the absence thereof, tensions can be reduced if the parent does not name the healthcare agent also as financial fiduciary, with its own normally more dominant tensions and the entrustment of payment of a parent's personal and healthcare needs.

In addition, if a parent wishes to receive "in home" care, notwithstanding its cost may exceed the cost of a long-term care facility (usually specifically limited to circumstances in which such care is not deleterious to his or her health), such intent should be stated in a healthcare power of attorney both to ensure such intent is carried out and to eliminate controversies among children that may be motivated by their own economic interests. Further, to avoid a claim against a sibling serving as healthcare fiduciary regarding a healthcare decision that may have adversely affected the parent's health or resulted in the parent's death, most clients include a provision in their

healthcare power of attorney that expressly relieves a child serving as a healthcare agent from liability for any healthcare decision made in good faith and without any intention of harming the parent. As there is otherwise likely to be the issue of whether the parent intended for the health care agent to be compensated, the intent of the parent in this regard also should be specified in the instrument. However, as with children serving as financial fiduciaries, there can be adverse family harmony consequences when a child takes a health care fiduciary fee, even though it is parent-sanctioned.

As a final consideration relevant to family harmony, a parent should consider executing a living will, a normal staple of estate planning. The provisions of the living will should identify, with particularity, the wishes of the parent regarding life-sustaining medical procedures during any period in which the parent is not competent to make medical decisions. A parent should specify whether he or she desires to have life-sustaining or other medical procedures withheld or discontinued if he or she suffers from a terminal condition or perhaps other condition without a reasonable possibility of returning to a meaningful quality of life. In the absence thereof, such decisions ordinarily are made by the healthcare agent under the provisions of the healthcare directive and thus subject to emotionally-charged circumspection by the healthcare agent's siblings as to whether the agent's decisions comport with their parent's intent.

Following the death of a parent who is not survived by a spouse, it is not an uncommon occurrence for children to have contentious disagreements over a parent's wishes regarding funeral, burial or cremation arrangements. Thus, it is important for a parent to make such wishes known. This can be done by specifying in the health care power of attorney if governing law authorizes the health care agent to make such decisions following the parent's death or under a separate writing. In any event, such wishes, along with any specific prior arrangements in this regard made by the parent, should also be made verbally known to appropriate family members during the parent's

lifetime to insure that such written provisions are not overlooked in the brief and highly emotional period following the parent's death in which such arrangements are required to be made.

WHETHER TO ADVISE CHILDREN OF THE ESTATE PLAN

Another factor which can significantly impact family harmony is parental disclosure of the specifics of the parent's estate plan to children. The conventional wisdom advocating such disclosure is that it will "clear the air" during the parent's lifetime when the parent is available to explain the plan's rationale and avoid any "shock" or "surprise" which might otherwise accompany such disclosure following a parent's death. However, this issue is far too complex to be reducible to simplistic aphorisms.

Lifetime parental disclosure to children of the elements of the estate plan and attendant family discussion will not necessarily provide any enhancement of family harmony following the parent's death. This is because parents frequently are tactically and emotionally ill-positioned to both anticipate and "head off" potential family conflicts or displeasure regarding the plan following their deaths among adult children living independent lives. Moreover, lifetime disclosure will provide an extended period of time for any unresolved discontent caused by such disclosure to smolder prior to the parent's death.

Thus, whether it is advisable for a parent to disclose any aspect of the parent's estate plan to a child or other descendant is dependent upon the specifics of the estate plan, the particular family situation, the extent of such disclosure, and the proper evaluation of the benefits and detriments in making such disclosure. It is often difficult for a widow, widower, or other single parent to make this determination objectively. It can be tempting for them to converse with their children regarding their assets and their estate plan, including the specifics of testamentary dispositions, as a way of "keeping in touch,"

providing a lifetime testament of their final act as a parent, or underscoring parental concern and affection.

Simply stated, it is difficult to divine a convincing rationale as to why as a general rule lifetime parental disclosure as to any aspect of the estate plan, which a child conceivably might find objectionable, is necessarily more likely to enhance post-death family harmony than the post-death disclosure of a parent in a well-worded "personal declaration" statement reciting parental rationale of the salient aspects of the estate plan. Lifetime disclosure risks potentially contentious and polarizing discussions between a parent and children and among children over such plan aspects that can exacerbate post-death discontent among family members. It also carries with it not only a significant risk of creating otherwise avoidable family disharmony during the lifetime of a parent, but also other significant potential adverse consequences discussed below in this Section.

ESTATES HAVING A CLOSELY HELD BUSINESS

As discussed above regarding estates holding farms and closely-held business assets, it normally is prudent to involve children during a parent's lifetime in at least the business succession aspects of the estate plan. This involvement is necessary to appropriately address, discuss, and test family harmony and management issues that are unavoidably attendant to family business succession planning prior to the parent's death. Otherwise, there is no opportunity for the parent to make appropriate adjustments to the estate plan. Disclosure in this context also minimizes the risk of designing a business succession plan based on certain assumptions that otherwise might ultimately prove to be incorrect.

NON-BUSINESS ESTATES

In other situations, disclosure can be problematic and create an immediate risk to family harmony. Children may not

understand, appreciate, or take an objective view of the parent's rationale in devising the plan. If a third-party financial fiduciary is selected, children may resent their parent's perceived lack of trust in them. If a parent chooses instead to name a specific child or children to serve as financial fiduciary, disclosure of such decision may result in immediate discontent, if not blatant jealousy, among other children.

There is a social principle in the United States that "people equidistant in kinship from the deceased have in some sense equal claims on the estate"¹¹³ Thus, if the dispositive plan does not provide for equal treatment among children, family harmony may be particularly stressed by disclosure of the estate plan. A parent may decide to give a child who has participated in the operation of a farm or other closely-held business a greater share of the estate or trust because of the child's substantial time commitment or achievement. Other children may not fully appreciate this decision, particularly if the child's compensation in such business endeavor was not in excess of that in the marketplace for similar work or what the child otherwise could have achieved in another endeavor given the child's education and abilities. Also, a parent's decision to give more to a child having a greater economic need normally is unappreciated by other children who may conclude that they are simply being penalized for achieving what their parent had hoped or expected of them.

In situations where a child's greater economic need is the result of a disability, a parent may wish to consult with other children about whether they deem it appropriate for the parent to address this need. Depending on the estate's size and the potential availability of governmental resources to address the disabled child's needs, most such parents would be expectant that their children would favorably view unequal treatment in that circumstance. Furthermore, by discussing this issue with

113. Sandra L. Titus et al., *Family Conflict Over Inheritance of Property*, 28 FAM. COORDINATOR 337, 338 (1979).

their children, children would be made aware that such adjustment was at the impetus of the parent and not of a disadvantaged sibling having the capacity to influence the parent. However, this is not necessarily the case.

For example, the author has been involved in situations where clients had advised their children that they were considering favoring a disabled child who had been the recipient of lifetime financial assistance from them. In some of these situations, the disabled child's siblings not only inconsiderately concluded that the disabled child should not receive any favored economic treatment following the death of their parents. They were also of the viewpoint that it "would only be fair" that such disabled child's otherwise equal share of the estate or trust be charged with an advancement equal to the lifetime financial assistance provided by their parents.

Thus, there is a risk in such circumstances that the other children may lack generosity and disagree with the parent's or parents' proposed plan. Any such adverse viewpoint may tarnish a parent's view of dissenting children and create significant intra-family turmoil. It also will place parents in the uncomfortable position of knowing that if they proceed with their testamentary plan, they will be in direct contravention of the wishes of dissenting children. Should they nonetheless choose to do so, they will likely not only cause much greater umbrage among dissenting children than had the plan not been disclosed during their lifetimes, but also will incur the disrespect of such dissenting children whose opinion was sought only to be disregarded.

Even in the converse situation where the dispositive plan provides for equal treatment among children, disclosure of the estate plan may nonetheless find resentment from converse elements. As one would expect, the foregoing general social view that children should receive an equal amount of parental assets is often not shared by children of the perspective that they should receive a greater economic share of a parent's assets than their siblings. Thus, even if not motivated simply by greed, children who have been more attentive to a parent's needs, who

have contributed to the success of a parent's business or who have a greater economic need than their siblings, are likely to feel such factors merit them receiving a larger share of a parent's estate or trust than their siblings.

With regard to unequal treatment of a child held in parental disfavor, informing the child of a reduced share under the estate plan will immediately cause or increase disharmony. However, some parents may feel that warning a child held in disfavor that continued undesirable conduct may result in disinheritance may lead to a desired change in the child's behavior, but this possibility may be marginal. Instead, disclosure is more likely to further strain the relationship between the parents and the child, which could result in aggressive antagonism. Although some may dispute that such disclosure may lower expectations and thus reduce the risk of a judicial challenge, it is highly dubious that such risk would be significantly reduced.

In any event, risk of judicial challenge is not substantial when there is compliance with the testamentary formalities, when competency is either not at issue or fully documented, and when there is no underlying factual basis for undue influence. This risk is further diminished if a revocable trust is the primary testamentary instrument because there is no existing legal proceeding for a disaffected child to challenge the validity of the instrument.

Children also likely will object stringently to a parental estate plan that calls for their share to be held in trust with a third-party trustee to ensure prudent management of trust assets. A child gaining knowledge during a parent's lifetime of this aspect of the plan is likely to become immediately alienated from a parent.

It even can be somewhat risky to disclose that the parent is leaving assets in trust solely for tax and asset protection purposes with the child serving as sole trustee. A child simply may not understand the plan, feel that it is unduly more restrictive than outright ownership, suspect ulterior motives, or

conclude such protection is unnecessary. Such disclosure thus may cause some tension between the parent and child unless considerable time and effort, often with additional legal expenses, is expended to explain the rationale of the plan to the satisfaction of the child.

Perhaps even more risky, such disclosure may create a serious strain between a parent and an in-law who might discover, usually as a result of disclosure by a child, that the parent desires to protect parental assets from the spousal claims of an in-law. This may not only result in disharmony between a child's spouse and the child's parents, but it also may result in disharmony between the child and the child's spouse and indirectly affect the relationship between the child's children and the child's parents.

Incurring such risks of parental disclosure during the parent's lifetime is without any tangible benefit. The author has not had one instance of a child who did not comprehend or appreciate the benefits of such a trust when the asset protection and tax benefits of the trust were fully explained to the child, either during a parent's lifetime in a business succession context or following a parent's death when discussing the parent's rationale for such dispositive provisions.

If the estate plan calls for substantial charitable gifts, children having a less than charitable bent will often object. They may charge their parents with preferring charities over their own children. If parents are making distributions of a portion of their estates or trusts to grandchildren, a similar preference assertion is often made. Whether made outright or in trust, such bequests to grandchildren are usually made for the satisfaction derived in directly benefiting grandchildren, to provide for specific needs, or to ensure that assets are expended for their benefit, including educational needs of minor and young adult grandchildren. Unless bequests to young grandchildren are made in a trust or under a custodial account where the child/parent is serving as trustee or custodian, the child may conclude (sometimes correctly) that parents don't

trust them to properly expend bequeathed assets for their own children. Where there are unequal numbers of grandchildren per child, especially where bequests to grandchildren are sizable, children having a lesser number of children may object that their family unit is being penalized simply because they have a lesser number of children than their siblings.

Disclosure of the estate plan during a parent's lifetime may also embolden children to make suggested changes to the plan. This includes pressuring a parent to financially prefer the child over siblings on the basis of being either more deserving or more in need, adjust equal shares of other children to compensate for lifetime gifts, or name the child as financial or health care fiduciary.

Married children may express a desire that "their share" of their parent's estate go to their spouse in the event they should predecease their parents. If so, this desire will run contrary to the perspective of the vast majority of parents. Parents usually desire the share of a deceased child pass to the child's children, or if none, to their other living children or their descendants if deceased. They are usually of the view that the children of the deceased child are a more desirable recipient of the assets and more in need of resources than an in-law. They also have a concern that any amounts given to an in-law which are not necessary for their living needs will be either improperly expended or given to a new spouse following a remarriage rather than to the descendants of the deceased child. Even if they were otherwise inclined to provide for in-laws of children who predecease them, parents are disinclined from incurring the additional legal fees which would be necessary to create trusts under their testamentary instrument for surviving in-laws in such an unlikely contingency in order to ensure the trust assets are not unwisely expended or diverted by the in-law to unintended beneficiaries. Finally, parents normally have the perspective that it is the duty of their child, not them, to provide for their spouse.

A parent who does not accede to a child's request to make a requested change in the estate plan after a child has

plead the child's case to do so may not only incur disharmony from the child and the child's family during the parent's remaining lifetime. It would stand to reason that such unheeded request would be more likely to cause the parent to be held in less esteem following the parent's death than had aspects of the plan not been disclosed until following the parent's death.

Conversely, should a parent accede to the child's plea, not only will that aspect of the estate plan have become that of the child, not the parent, but in the majority of such situations any such accession would likely be directly contrary to the wishes of other children. Parents who are in a state of diminished capacity can be particularly vulnerable to filial pressures to make changes to their estate plan they would not have otherwise been made had they not been the subject of pressure occasioned by children gaining knowledge of their estate plan. In addition to distorting the parent's estate plan, any such changes would be expected to result in acute disharmony between the child who had been favored by such amendment and such child's siblings. If the parent was in a state of diminished capacity, there will also be probable litigation as to whether the parent's diminished capacity was sufficient for the parent to legally amend their estate plan or whether the parent was unduly influenced by the favored child.

In choosing to discuss their estate plan with children, parents also may unintentionally have changed the specter of a child's inheritance from a mere expectation to one of entitlement. Children advised of the extent and nature of their parents' estates and the manner in which it will be made available to them under their estate plan may modify their own spending habits in anticipation of such inheritance,¹¹⁴ question

114. This would seem much more likely to occur with children who have relied on their parents' largesse to support their lifestyle and perhaps in some circumstances where a parent has a short life expectancy. In the absence of parental financial disclosure, children may nonetheless sometimes be able to determine the size of their parents' estates from other sources. Indeed, in a story titled "Googling Dad's Assets," in the February 9, 2007 issue of the Wall Street Journal, Robert Frank reports that children of both wealthy and not so wealthy parents now have a wealth of information at their disposal on the Internet to ascertain the extent of their

the need for certain expenditures by a parent of their own assets, and on some occasions may even implore their parents to give them "a portion of their inheritance" prior to their death at a time the children can "make the most use of it" and their parents can "see them enjoy it."

Related to this change in perspective, such disclosure may inadvertently "open the door" to unwanted inquiries about any aspects of the plan the parents chose not to disclose or the size as well as the nature of the parent's estate. Occasionally, to the great consternation of a parent, a son-in-law or daughter-in-law will have the effrontery to make such untoward queries.

Parents should also be counseled that should they decide to disclose their estate plan to children, there will be an implicit commitment by them to also advise their children of any subsequent substantive amendment to the plan, even should it be adverse to a given child or children in terms of the chosen financial fiduciary, their share of the estate or trust, or the manner in which it is to be distributed (e.g., in a trust in which the child is not the trustee as opposed to outright). If such commitment is kept, there obviously will be potential disharmonious consequences to any disaffected child resulting from such disclosure. If it is "breached" and children who are subsequently disaffected do not become aware of the change until after a surviving parent's death, such children will likely hold their deceased parents in much less esteem for not "having been honest with them" in their failure to advise them of the subsequent change to their estate plan.

The foregoing caveats regarding disclosure of the financial aspects of the estate plan have much less application to a child named as health care fiduciary over the person of the parent. Because of the time sensitivity often demanded of health care

parents' assets. These so-termed online "silver-spoon sleuths" can find SEC reports, stock options, salaries, business sales, news reports and real property valuations. Robert Frank, *The Wealth Report: Googling Dad's Assets: Kids Find Family Worth Online, Worrying Parents: "A Recipe for Entitle-itis"*, WALL ST. J., Feb. 9, 2007, at W2.

decisions, parents frequently wish to advise children who are named as health care agent, either initially or as first successor if a spouse is unable to so serve, of such appointment and give them a copy of both the health care power of attorney and any living will. Although there is normally no need for other children to be made aware of such appointment prior to the time the duties of the health care agent should become operative, being so made aware would normally not have a major family harmony impact in contrast to that of the appointment of a child as financial fiduciary.

Nevertheless, such disclosure may lead children to inquire as to the financial aspects of a parent's estate plan and is not without at least some family harmony risk. The alternative is to not disclose such appointment to a child, but follow normal procedures which will ensure that health care practitioners will be promptly made aware of who is the acting health care agent. Thus, the parent should provide the parent's personal physician with a copy of the health care directive and any living will, conspicuously display copies of the health care advance directives in the parent's residence (in a prominently marked envelope on the front of the refrigerator is a common location), and keep copies of health care advance directives on the person, especially while traveling. Such information should include the address and phone number of the health care agent.

As with the appointment of a family financial fiduciary, it may be prudent from a family harmony perspective that the reasons for the appointment of a child as health care agent be made known. Thus, if parents understandably choose not to disclose such appointment to children who are not named as primary health care agent prior to their disability, it may be advisable for such parents to disclose the reasons therefore which are not of a pejorative nature to children not so appointed (e.g., the named primary health care fiduciary being in geographic proximity or in a health care profession) either under the provisions of the instrument or in a separate writing for disclosure subsequent to their disability.

In the situation where a parent has named a child as financial fiduciary for the parent under a will, revocable trust or durable power of attorney, the assumption of such role is seldom time sensitive and thus normally no significant benefit is achieved by prior disclosure from an administration standpoint. Upon a disability or death of a parent, there usually is ample time for the financial fiduciary to be made aware of such appointment, become acquainted with the financial situation of the principal, and assume the responsibilities of the position prior to any risk being incurred of an adverse economic consequence.

"BLENDED FAMILY" SITUATION

In "blended marriage" situations, the issues of equitable distributions among family members become even more complex. There are no standard societal norms or expectations regarding the disposition of estates or trusts in this situation.¹¹⁵ The longer the marriage of the spouses, the more likely a parent will desire to economically benefit a surviving spouse of non-substantial means and both parents will tend to conclude the cumulative assets of both should be distributed equally among the children of both spouses. Children of either spouse who receive a lesser share under such dispositive plan of a parent who has remarried than they would have had the parent remained single are unlikely to be accepting of this position. Instead, they are likely to conclude that they did not receive their "fair share" of their parents' estate and that their surviving parent breached the wishes of a predeceased parent in distributing a significant amount of parental assets that were substantially accumulated during the marriage of their parents to a step-parent or step-children.

Thus, the family situation of a remarried parent who has children from a prior marriage is deserving of special

115. Titus et al., *supra* note, 113, at 338.

consideration. In addition to a parent's remarriage being difficult for children to accept emotionally, filial concerns over the ultimate disposition of the estate of a parent also may make it difficult for children to accept a step-parent as a member of the family, thereby straining the parent-child relationship.

If such parent has entered into a premarital agreement with the step-parent or the step-parent has consented to the parent's estate plan, and any bequest by the parent to the step-parent or step-children in the estate plan will not significantly reduce the amount of assets their children would otherwise have received in the absence of such bequests, the parent may choose to make a simple and direct statement to their children that they can be assured that the property interests and intent of the parent and the parent's deceased spouse have been preserved and protected under the parent's estate plan. In addition, the parent may request that their children respect their choice of their step-parent as a marriage partner.

Such statement should help assuage the parent's children of any such property disposition concerns, as well as enhance the prospects of the children acceding to the parent's request of an amiable-if not totally accepting-relationship between the step-parent and the parent's children. It would also raise the "thinly veiled" possibility that should the children not be reasonably accepting of the parent's spouse, the parent could amend the provisions of the parent's estate or trust regarding dispositive provisions of children holding an uncivil adverse perspective.

It is seldom advisable in this situation for a parent to disclose to children the details of any bequest to a step-parent or step-children. Any other parental disclosure of any specific aspects of their estate plan or the nature of their estate during the parent's lifetime should only be made if it would have been desirable in the absence of the remarriage.

NON-DISCLOSURE SITUATION

If a parent chooses not to inform children of the estate plan beyond perhaps facets relating to the healthcare power of

attorney, a third party of close personal or professional relationship to the parent may be entrusted with the responsibility of delivering the appropriate documents to the financial fiduciary following the parent's disability or death. Alternatively, a child named as healthcare agent could be added as an additional signatory on a safe deposit box in which is placed a sealed envelope containing all other estate planning documents. The front of the envelope could contain marked instructions to deliver the envelope to the named financial fiduciary and inform the parent's estate planning attorney of such circumstance. The child named as healthcare agent would be instructed to procure the envelope and follow the directions thereon if a single parent, or both parents, became disabled or died.

If an informed parent concludes, in a non-business family situation, that the risks of disclosing the estate plan outweigh any benefits, the parent should reduce to writing, in either a "personal declaration" provision in the testamentary instrument or a separate writing, a post-death disclosure of other important facets of the estate plan beyond that regarding disparate treatment among children. This can include statements concerning asset protection by leaving assets in trust and naming a third-party financial fiduciary for reasons of family harmony and to relieve children of the burden. The disclosure also could contain other factors that the parent deems important in the administration of the estate or trust, such as regular communication with other siblings if a child is chosen as financial fiduciary and a suggested attorney, accountant, and investment advisor for the estate or trust. Such post-death disclosure should foster an understanding in children of the parent's estate planning goals without the incurrance of the foregoing immediate risks to family harmony that would otherwise unavoidably accompany disclosing the estate plan during the parent's lifetime.

There is also the issue of choosing the proper testamentary instrument in circumstances where parents do not

wish for their children to be informed of the specifics of their estate plan or the extent of their assets until the death of the surviving spouse. Wills are a matter of public record, along with all other pleadings and filings of the probate estate, including the inventory of the estate. Moreover, upon filing a will for probate, copies of the will are normally required under state law to be sent to all beneficiaries of the estate as well as all persons who would have inherited the property had the person died intestate, including children. In addition, an inventory of estate assets and an accounting of the administration of the estate are also usually required to be filed in the probate estate. Further, unless state law permits a testator under the provisions of a will to waive accountings of any testamentary trust created under the will, they normally will be required to be filed with the court.

Revocable trusts, on the other hand, normally do not need to be filed as a matter of public record. Moreover, as long as governing state law permits a settlor to waive any otherwise required legal requirement for the trustee to furnish copies of the revocable trust agreement and accountings to any current and remainder beneficiaries of the trust following the settlor's disability or death to any person other than a surviving spouse who is a trust beneficiary until the death of both parents, such privacy is likely to be preserved.¹¹⁶ Thus, parents who do not desire for their estate plan or the nature of their estate to be disclosed to their children until the death of the surviving parent, and particularly who wish to leave assets in trust for the benefit of their surviving spouse,¹¹⁷ normally should consider

116. See, e.g., UNIF. TRUST CODE § 105(b) (amended 2004 & 2005), 7C U.L.A. 428 (2006) (specifying which provisions of the UTC a settlor may waive under the trust agreement, provides an option as to whether accountings and other reporting requirements are to be included in such proscribed waiver list. Kansas specifically included accountings and other reporting requirements in such permissible waiver list when it enacted the UTC.). The governing law of other states varies on the efficacy of such waivers. See, e.g., George G. BOGERT ET AL., LAW OF TRUSTS AND TRUSTEES, § 973 (2000).

117. In the absence of a testamentary trust being created under the provisions of a predeceased spouse's will or revocable trust for the benefit of a surviving spouse,

using a revocable trust as their primary testamentary instrument.

WARDING OFF UNWANTED QUERIES

Despite a parental desire for privacy during lifetime regarding the nature of their estate and the specifics of their estate plan, a child may nonetheless inquire into either or both respects. It would be a relative safe assumption that children who would make such unsolicited inquiries are more likely to be motivated by their own self-interest rather than the interests of their parents. Parents may gently deflect such queries by requesting the inquiring child respect the parents' desire for privacy regarding such information in the same manner the parents respect the confidential and personal nature of information regarding their children.

With regard to any such filial question regarding the specifics of their estate plan, parents may additionally respond that, as they have taught their children to be self-reliant, they have confidence their children would not imprudently base their own lifestyle on any possible inheritance. Thus, they might state that they appreciate that such inquiry must have been motivated by the child's laudable desire that the plan not be disruptive of family harmony between or among the inquiring child and their other children following their death. In that regard, the child making such a query can be assured by their parents that the primary estate-planning goal is to preserve the legacy of family harmony. Parents also could inform the child that the estate plan is crafted to save taxes and costs of administration and to

there would otherwise normally be no significant risk of applicable law requiring the disclosure of the estate plan or parental assets to children. In the absence of the creation of a testamentary trust, as long as parents are able to title all of their assets as joint tenants with rights of survivorship with each other or name each other as primary beneficiary on their assets, thus avoiding both probate procedures and statutory or common law requirements which would otherwise govern the disclosure of will and trust instruments, court inventories or accountings, or a requirement that the trustee provide a copy of the trust instrument or accountings to children who are current or remainder beneficiaries of the trust.

ensure that the managerial aspects of their estates will not impose any administrative burden on their children.

SUMMARY

It is understandably quite common for there to be a significant incompatibility between the dispositive and fiduciary desires of parents and those of their adult children. If such incompatibility surfaces during the parent's lifetime as a result of the disclosure of the parent's estate plan, it can result in considerable friction and disharmony not only between the parent and child and among children, but also between a child's spouse and the child's parents. In addition to the emotional toll this can exact on parents, particularly in their elder years, it can also result in disillusionment and the blemishing of erstwhile positive images parents had of their children, without necessarily providing any offsetting benefit to family harmony among their children following their disability and deaths.

It thus behooves estate planning attorneys to counsel their clients to make a very careful assessment of any perceived benefits of disclosure of their assets or estate plan to their children versus the associated adverse risks. Should clients choose in favor of confidentiality, their counsel should advise them of strategies which will allow them to tactfully fend off any unwanted inquiries of their children.

CONCLUSION

Notwithstanding the high priority most clients place on maintaining family harmony in the estate planning process, estate planning attorneys for the most part have directed their attention primarily on other more technical issues relating to the management and disposition of property and the minimization of taxes and administrative costs. In so doing, they have inadvertently been incorporating a potential legacy of family discord in their client's estate plans, frequently resulting in fractious family disagreements following the disability or death

of a parent, substantial legal and related costs being incurred in resolving various contentious administrative issues related thereto, and skewed distributions among the beneficiaries of their client's estates and trusts.

Nothing less than a sea change in the traditional approaches to the estate planning process appears to be warranted. Estate planning legal counsel should embrace a more holistic approach to their practice, emphasizing "preventive legal medicine" regarding family harmony issues in the same way a proactive stance regarding individual health has evolved in the medical field. It is thus incumbent that estate planning attorneys adequately inform clients of the impact various estate planning strategies and decisions can have on family harmony. It is equally important for them to include carefully crafted provisions in testamentary instruments which both anticipate and obviate frequently occurring disharmonious family circumstances that can erode the value of the estate or trust and severely damage the integrity of the estate plan. In the author's opinion, such redirected focus would eliminate most of the disharmonious family situations which are a frequent occurrence in the administration of the estate or trust of a disabled or deceased parent and when children are advised in inappropriate circumstances of their parents' assets or aspects of their estate plans.

Accommodating such a major shift in the traditional estate planning paradigm will no doubt pose a challenge to both the efforts and the professional objectivity of estate planning attorneys. The structure and substantive provisions of many testamentary instruments will need to be appropriately revised. Properly advising clients of strategies enhancing family harmony will require much more than a nominal time investment and may disabuse clients of preconceptions which would have otherwise favored a greater compensatory role for legal counsel in the operational phases of the estate plan following the client's disability or death.

Nonetheless, in the author's experience, attorneys who do so will enhance their professional reputation and derive

personal gratification in having furthered this normally penultimate client objective. Their clients in turn are likely to be highly appreciative of their professional objectivity and have a much greater level of satisfaction with the entire estate planning experience.